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No.

IN THE

Supreme Court of the United States

TERM 1983

BURLINGTON NORTHERN, INC., SUCCESSOR BY MERGER TO ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioner,

VS.

JAMES C. BAIR,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Missouri Supreme Court

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June 27, 1983

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

I. The Missouri Supreme Court in *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. banc 1983), erroneously held that federal law does not require that a "present value" instruction be given in an F.E.L.A. case, even though Petitioner requested and tendered one, and consequently that court has decided a federal question in conflict with this Court's decisions, as well as those of the federal courts of appeal.

II. The Missouri Supreme Court in *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. banc 1983), deprived the Petitioner of equal protection under the law in approving the exclusive use of M.A.I. 8.02, the jury instruction for damages in personal injury F.E.L.A. cases tried in the state courts of Missouri, in that the language of M.A.I. 8.02, in the setting of the Missouri instruction format, allows a jury to make an award to the plaintiff based on indirect, remote and speculative damages not directly or proximately caused by the injury plaintiff received, and this conflicts with decisions of this Court and of the federal courts of appeal.

III. The Missouri Supreme Court in *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. banc 1983), has held that it is not reversible error for a trial court to exclude in an F.E.L.A. case, evidence of the non-taxability of the damage award, or to refuse a tendered jury instruction that any damage award would not be subject to income tax and therefore the Missouri Supreme Court has decided a federal question - measure of damages in an F.E.L.A. case - in a way in conflict with decisions of this Court, notably, *Norfolk & Western Railway Company* v. *Liepelt,* 444 U.S. 490, 62 L.Ed.2d 629, 100 S.Ct. 755 (1980).

IV. The Missouri Supreme Court's mandate that M.A.I. 24.01, the verdict director in F.E.L.A. cases tried in the state courts of Missouri, be used in every F.E.L.A. case, denies F.E.L.A. defendants due process of law and equal protection under the law because it does not state a specific act of negligence on the defendant's part and therefore is a roving commission for the jury, and prevents the defendant from being put on notice of the alleged negligence against which it is to defend and furthermore this violates the Supremacy Clause in Article 6, Clause 2 of the Constitution of the United States because it in effect pre-empts the federal law with regard to what a proper instruction is.

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JURISDICTIONAL STATEMENT

Petitioner Burlington Northern, Inc. (Burlington Northern, Inc. is the successor through merger of St. Louis-San Francisco Railway which was the original defendant in this suit. Hereafter, the term Petitioner will simply be used for the sake of clarity.), filed this Petition for Writ of Certiorari after the Missouri Supreme Court rendered its opinion in *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. banc 1983). The Missouri Supreme Court denied Petitioner's Motion for Rehearing on March 29, 1983, thereby making the judgment final on that date. Petitioner has ninety days from March 29, 1983 to file its Petition for Writ of Certiorari and therefore, this Petition is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). The questions presented involve the unconstitutionality of certain pattern jury

instructions promulgated by the Missouri Supreme Court for F.E.L.A. cases, and that court's holdings which are contrary to decisions of this Court and the Federal Courts of Appeals.

STATEMENT OF THE CASE

Although the *Bair* opinion sets out in detail the factual account of the event in question (see Appendix A), Petitioner will sketch a brief factual summary thereof. This case was tried in November of 1979. The injured railroad worker, Mr. Bair, was a thirty year-old journeyman carman when the alleged injury he sustained occurred on January 18, 1973. He was using a pneumatic jack and a pole to push out the indented ends of boxcars. The jack weighed 300 to 400 pounds and Bair was allegedly injured while moving it inside a boxcar. He brought suit under the F.E.L.A. against the St. Louis-San Francisco Railway, alleging defendant's negligence in four specifications as follows: Defendant St. Louis-San Francisco Railway failed to provide reasonably safe methods, reasonably safe working conditions, reasonably adequate help and assistance, and reasonably safe and adequate equipment to straighten the ends of the cars. Under a verdict director which submitted that defendant failed to provide reasonably safe conditions for work, or reasonably safe methods for work (M.A.I. 24.01), the jury found for plaintiff and awarded him $313,500 in damages.

The Petitioner moved for a new trial but the trial court denied the motion. Petitioner appealed to the Court of Appeals, Eastern District, which affirmed the judgment. Subsequently, Petitioner successfully obtained transfer to the Missouri Supreme Courts pursuant to Missouri Supreme Court Rule 83.02. Rule 83.08 (See Appendix B) provides that the transfer of the case merely shifts the transcript and briefs to the Missouri Supreme Court. Therefore all points of error asserted in the Court of Appeals are automatically raised in the Supreme Court. That court also affirmed the judgment in *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. banc 1983).

The issues raised herein are concerned with jury instructions. Under Missouri Supreme Court Rule 70.02, (see Appendix D) it is clear that Missouri Approved Instructions are mandatory and are to be used to the exclusion of any others. Under Missouri Supreme Court 70.03, a party need not object at trial to any instructions given at the request of another party or on the court's own motion or to the refusal of any instructions requested by such party. (See Appendix D). For purposes of clarity, each of the four instruction issues will be set out hereunder with separate headings.

Present Value Instruction

At the instruction conference, counsel for Petitioner tendered, and the court refused, an instruction to have the jury reduce the award to its present value. (See Appendix E, for the instruction conference transcript and see Appendix H, where this instruction is marked as Instruction A, which the trial court refused). In accordance with Missouri Supreme Court Rule 70.03, Petitioner raised in its motion for new trial the fact that it had tendered this instruction and that it was refused. (See Appendix G, paragraphs 21(a) and 22). The Petitioner also there argued that to refuse to give such an instruction was erroneous because decisions of this Supreme Court and the federal law of the F.E.L.A. entitled it to such an instruction. The trial court denied the motion for new trial (see Appendix F). Petitioner then raised the issue in the Missouri Court of Appeals, Eastern District where the point was ruled against it. (See Appendix C). Subsequent to that decision, Petitioner successfully obtained transfer to the Missouri Supreme Court and there raised the issue again. That court held that it was not persuaded that federal law required a present value instruction in an F.E.L.A. case. *Bair* v. *St. Louis-San Francisco Railway Company*, 647 S.W.2d 507, at 510 [2] (Mo. banc 1983). (See Appendix A).

Damages Instruction

M.A.I. 8.02 is the damage instruction which the Missouri Supreme Court requires to be given in an F.E.L.A. case. At the instruction conference, Petitioner objected to this instruction, which was given in this case, as depriving it of its property without due process of law because it allowed the jury to find it liable for indirect, remote, speculative and conjectural damages. (See Appendix E). Petitioner specifically stated that this result violated its rights under the Fifth Amendment to the U.S. Constitution, Article 1, Section 10 and under the F.E.L.A. The Court of Appeals, Eastern District held that M.A.I. 8.02 was the exclusive damage instruction and that no other damage instruction could be used. The Missouri Supreme Court held that M.A.I. 8.02 was sound, and was *the exclusive damage instruction* for F.E.L.A. cases tried in the state courts of Missouri. *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d 507, at 510[3]. Moreover, Petitioner tendered an instruction designed to eliminate speculative damages, but it was refused by the trial court (see Appendix E). The Missouri Supreme Court held the instruction to be properly refused because it was not within the M.A.I. scheme, which makes M.A.I. 8.02 the exclusive damage instruction. *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d at 510[4].

Income Tax Instruction

At the instruction conference, Petitioner tendered, and the trial court refused, an instruction to inform the jury that any award they made to plaintiff would not be taxable as income to him. (See Appendix E, and see Appendix H, for the instruction, marked as Instruction E). In its motion for new trial, Petitioner raised as error the trial court's refusal to allow it to question plaintiff about the non-taxability of any award (See Appendix G, paragraph 11), and its refusal to submit the tendered income tax instruction on the ground that federal law clearly entitled it to have such an instruction submitted to the jury. (See Appen-

dix G, Motion for New Trial, paragraph 21(c)). Petitioner also there asserted that the refusal to give the instruction deprived it of equal protection under the Fourteenth Amendment of the United States Constitution, Article 1, Section 2 and deprived it of its property without due process of law. The Missouri Court of Appeals, Eastern District, ruled against the Petitioner on this point. On transfer to the Missouri Supreme Court, that court also ruled this point against Petitioner, stating that although *Norfolk & Western Railway Company* v. *Liepelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980) required such an instruction, the error was not prejudicial to Petitioner in this case. *Bair* v. *St. Louis-San Francisco Railway Company*, 647 S.W.2d at 512[10] (see Appendix A).

Verdict Director - M.A.I. 24.01

In its motion for new trial, Petitioner objected to the trial court's giving M.A.I. 24.01, which is the verdict director in F.E.L.A. cases tried in Missouri state courts, on the grounds that it deprived the Petitioner of its rights under the Fourteenth and Fifth Amendments of the United States Constitution, Article 1, Section 2, and the Missouri Constitution, Article 1, Section 10, and its rights under federal law in that the instruction does not require the plaintiff to set out a specific act or acts of negligence which he claims were the cause of his injury. Rather, M.A.I. 24.01 merely requires the jury to make a finding of a general allegation of negligence (see Appendix G, Motion for New Trial, paragraph 19). The trial court denied the motion for new trial. The Missouri Court of Appeals, Eastern District, ruled the point against Petitioner and on transfer, the Missouri Supreme Court reviewed the point and ruled it against Petitioner, finding that M.A.I. 24.01 is proper. *Bair* v. *St. Louis-San Francisco Railway*, 647 S.W.2d at 510 [5] (see Appendix A).

ARGUMENT

I. The Missouri Supreme Court In *Bair* v. *St. Louis-San Francisco Railway Company*, 647 S.W.2d 507 (Mo. banc 1983), Erroneously Held That Federal Law Does Not Require That A "Present Value" Instruction Be Given In An F.E.L.A. Case, Even Though Petitioner Requested And Tendered One, And Consequently That Court Has Decided A Federal Question In Conflict With This Court's Decisions, As Well As Those Of The Federal Courts Of Appeal.

In 1916, this Court held that an F.E.L.A. defendant has a right, as a matter of federal law, to an instruction telling the jury that they are to award damages on the basis of present value only. *Chesapeake & Ohio Railway Company* v. *Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). The theory underlying this is the plaintiff's duty to mitigate the amount of his damages and in these circumstances he could certainly do so by putting the money in an interest bearing account. *Id.*, at 489. *Kelly* has not been overruled, and has been cited in countless cases dealing with the present value instruction issue. Moreover, Petitioner has yet to find a case which affirms a verdict where a proper present value instruction was requested and refused and where the jury rendered its verdict without any present value instruction being given. For example, in *Beanland* v. *Chicago, Rock Island & Pacific Railroad Company*, 480 F.2d 109 (8th Cir. 1973), the Eighth Circuit Court of Appeals, citing extensive authority, held that failure to give a present value instruction in an F.E.L.A. case was prejudicial error. 480 F.2d, at 115. The *Beanland* court relied directly on *Kelly, supra*, in reversing the case because no present value instruction of any kind was given. 480 F.2d, at 114. *Beanland* also cited *Sleeman* v. *Chesapeake & Ohio Railway Company*, 414 F.2d 305 (6th Cir. 1969), where no present value instruction was given and the court remanded the case for a recomputation of the damages based on the *Kelly* "present worth formula." 480 F.2d, at 115. Nor does there

need by any intricate formula submitted to the jury to aid them in arriving at present value - they can properly apply the rule upon being told that the award should be only money value. *Duncan* v. *St. Louis-San Francisco Railway Company,* 480 F.2d 79, 87 (8th Cir. 1973), *cert. denied,* 414 U.S. 859, 38 L.Ed.2d. 109, 94 S.Ct. 69 (1973). *Heater* v. *Chesapeake & Ohio Railway Company,* 497 F.2d 1243 (7th Cir. 1974), *cert. denied,* 419 U.S. 1013, 42 L.Ed. 287, 95 S.Ct. 333 (1974).

In denying Petitioner's claim of error of the trial court's refusal to give the tendered present value instruction, the Missouri Supreme Court made clear that its position is that the M.A.I. scheme or system does not allow for a present value instruction and therefore Missouri juries cannot be instructed on the present value issue. *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d at 510 [2] (see Appendix A). Given that the unanimous weight of authority is that if requested, the present value instruction must be given, this statement is clearly contrary to opinions of this Court, notably that in *Kelly.*

Moreover, the instruction tendered was adequate and acceptable under *Kelly,* because it would merely have informed the jury as follows:

> If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must therefore determine the present value or present worth of the money which you award for such future loss.

(This was Instruction No. A tendered by Petitioner to the trial court, but refused by that court. See Appendix H.) The instruction is short and straightforward and embodies the concept of mitigation of damages articulated in *Chesapeake & Ohio Railway Company* v. *Kelly, supra.* Therefore, it would have

been proper to give this instruction on present value and refusal of it was prejudicial error. *Cf. Louisville & Nashville Railroad Company* v. *Holloway,* 246 U.S. 525, 62 L.Ed. 867, 38 S.Ct. 379 (1918) (tendered present value instruction, which included a 6% interest rate and a 28.62 year life expectancy of the decedent, was held properly refused because of the specific formula given.)

Petitioner tendered a proper present value instruction, had it refused by the trial court, objected to that refusal, and has properly preserved its objection up through the appellate process to this Court. This point of error involves a fixed, substantive right for F.E.L.A. defendants under federal law and should not be resolved against Petitoner merely because the State of Missouri refuses to follow controlling federal law. Therefore, Petitioner prays this Court to allow the Writ of Certiorari to issue on this point of error.

II. The Missouri Supreme Court In *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. Banc 1983), Deprived The Petitioner Of Equal Protection Under The Law In Approving The Exclusive Use Of M.A.I. 8.02, The Jury Instruction For Damages In Personal Injury F.E.L.A. Cases Tried In The State Courts Of Missouri, In That The Language Of M.A.I. 8.02, In The Setting Of The Missouri Instruction Format, Allows A Jury To Make An Award To The Plaintiff Based On Indirect, Remote And Speculative Damages Not Directly Or Proximately Caused By The Injury Plaintiff Received, And This Conflicts With Decisions Of This Court And Of The Federal Courts Of Appeal.

In the case at bar, the trial court gave the then-current M.A.I. (Missouri Approved Instruction) 8.02 (modified for this case), which was Instruction Number 7, which provides as follows:

> If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sus-

tained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in the evidence.

If you find plaintiff contributorily negligent as submitted in Instruction No. 6, then you must diminish the sum in proportion to the amount of the negligence attributable to plaintiff.

The Committee's Comment to M.A.I. 8.02 states that the instruction is the same as the ordinary negligence damage instruction (M.A.I. 4.01) except that the word "direct" has been removed as a modifier of "result." This was done, the committee explains, to comport with federal substantive law of the F.E.L.A. (The Committee Comment is set out in full in Appendix I).

This action by the Missouri Supreme Court shows that it is erroneously blurring together the two separate issues of (1) an F.E.L.A. employer's threshhold liability for injuries sustained and (2) the damages [directly] caused by the injury. It is true that the F.E.L.A. alters common law negligence for the purpose of establishing an F.E.L.A. employer's liability to a question of whether *any* negligent act by the employer played a part in the employee's injury. *Crane* v. *Cedar Rapids & I. C. Railway Company,* 395 U.S. 164 (1969); *Rogers* v. *Missouri Pacific Railroad Company,* 352 U.S. 500, 506-507 (1957). However, this statutorily created standard of negligence is designed only to aid the F.E.L.A. plaintiff on the issue of liability. Certainly, a plaintiff is entitled only to damages which he can prove were directly or proximately caused by the injury for which he is suing. *Holladay* v. *Chicago, Burlington & Quincy Railroad Company,* 255 F.Supp. 879, 887 (D.C.Iowa 1966). This Court has shown that its members clearly perceive the distinction between these two aspects of this issue; in *Rogers* v. *Missouri Pacific Railroad Company,* 352 U.S. 500, 506-507, the court said:

[T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence

> played any part, even the slightest, in producing the injury or death for which damages are sought. (Footnote omitted).

Rogers v. *Missouri Pacific Railroad Company,* 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443, (1957). The soundness of the proposition that proximate cause is still required between the injury sued for and the alleged damages almost too obvious to require citation. Many cases have held it applies in F.E.L.A. cases. *E.g., Chesapeake & Ohio Railway* v. *Carnahan,* 241 U.S. 241, 244-245, 60 L.Ed. 979, 36 S.Ct. 594 (1916); *Shupe* v. *New York Central System,* 339 F.2d 998 (7th Cir. 1965) *cert. denied,* 381 U.S. 937, 14 L.Ed.2d 701, 85 S.Ct. 1769 (1965); *Harris* v. *Norfolk Southern Railway,* 319 F.2d 493 (4th Cir. 1963) *cert. denied,* 375 U.S. 985, 11 L.Ed.2d. 473, 84 S.Ct. 517 (1964); *Holladay* v. *Chicago, Burlington & Quincy Railroad Company,* 255 F.Supp. 879, 887 (D.C.Iowa 1966).

From the authorities cited in the Committee Comment to M.A.I. 8.02 it seems the Missouri Supreme Court is confused as to the extent of the holdings in *Rogers* v. *Missouri Pacific Railroad Company, supra,* and *Crane* v . *Cedar Rapids & Iowa City Railway Company, supra.* The Missouri Supreme Court apparently believes those cases go so far as to alter the traditionally required, direct causal connection between injury and actually claimed damage. This is an erroneous statement of the law in F.E.L.A. cases for at least one of two reasons - either (1) the F.E.L.A. does not affect state substantive law on the issue of required causal connection between injuries sued for and damages flowing therefrom or (2) federal law controls the issue, becuase it is something which bears on an F.E.L.A. plaintiff's right to recover, and it requires direct or proximate cause between the injury and the damages claimed.

There is no doubt that the standard of negligence has been the most frequently litigated issue in F.E.L.A. law. *E.g., Crane* v. *Cedar Rapids & I. R. Company, supra; Rogers* v. *Missouri*

Pacific Railroad Company, supra. The simple fact is, however, that the issue of negligence to impose liability for injury and the issue of damages resulting from that injury are two different things. Although the F.E.L.A. has changed the former, it has not changed the latter. Therefore, even under the F.E.L.A., a plaintiff must show direct or proximate cause between the injury he sustained and the damages he is claiming as a result of the injury. *E.g., Shupe* v. *New York Central System,* 339 F.2d 998 (7th Cir. 1965) *cert. denied,* 381 U.S. 937, 14 L.Ed.2d. 701, 85 S.Ct. 1769 (1965); *Harris* v. *Norfolk Southern Railway Company,* 319 F.2d 493, 495-496 (4th Cir. 1963), *cert. denied,* 84 S.Ct. 517, 375 U.S. 985, 11 L.Ed.2d 473, (1964); *Dugo* v. *Pennsylvania Railroad Company,* 125 F.Supp. 934 (D.C.Penn. 1954). This Court itself has so stated. *Chesapeake and Ohio Railway Company* v. *Carnahan* 241 U.S. 241, 244-245, 60 L.Ed. 979, 36 S.Ct. 594 (1916). Moreover, this proposition is not unique to federal law but rather is one of the cornerstones of the law of torts, unchanged by the F.E.L.A.

Most all jurisdictions realistically accommodate the proximate cause issue for damages. Some utilize separate instructions on causation and/or separate instructions on each element of damage. *E.g.,* see the Illinois Pattern Jury Instructions - Civil (2d Ed. 1971) Prior to the M.A.I. system in Missouri, the damage instruction could at least specify each element of damage proper for the jury's consideration. *E.g., Pierce* v. *New York Central Railway Company,* 257 S.W.2d 84, 89 [8,9] (Mo. 1953). Some jurisdictions use special verdicts or interrogatories for the jury. *E.g., Gallick* v. *Baltimore & Ohio Railway Company,* 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659 (1963). Such approaches limit the jury to considering only proper elements of damage when determining an award. Any of these approaches would be better than that which the State of Missouri has in its M.A.I.

In the Missouri Approved Instruction scheme, the damage instruction for F.E.L.A. cases is M.A.I. 8.02 which, as pointed

out above, does not require that plaintiff's damages be directly or proximately caused by the injury to plaintiff. Moreover, M.A.I. 8.02 is the only damage instruction the Missouri Supreme Court will allow to be given in an F.E.L.A. case tried in a state court of Missouri. (See Rule 70.02(b), Appendix D). It in no way instructs the jury what elements of damage may be properly considered.

The repercussions of the format Missouri uses to instruct on damages cannot be ignored as procedural (and thus governed by state law). The format utilized is procedural, but the Missouri Supreme Court's position that federal law does not require that damages directly or proximately result from the injury is a misstatement of substantive federal law as to damages under the F.E.L.A. This court has stated that such a causal relation must exist. *See Chesapeake & Ohio Railway Company* v. *Carnahan,* 241 U.S. 241, 244-245, 60 L.Ed. 979, (1916). This erroneous declaration of the federal law by the highest court of a state certainly constitutes grounds for allowing a writ of certiorari to issue. *Seaboard Air Line Railway* v. *Padgett,* 236 U.S. 668, 35 S.Ct. 41, 59 L.Ed. 777 (1915).

Moreover, in the legal philosophy of the State of Missouri, the absence of the adjective "direct" in a damage instruction is prejudicially erroneous because it allows a jury to speculate and consider damage indirectly caused. To this effect, the Missouri Supreme Court has stated:

> The deletion of the word "direct" as a modifier of "result" changes the meaning of the instruction. Damages sustained as a result of an occurrence would include all such damages, whether resulting directly or indirectly. Only if the word "direct" is kept in the instruction is the jury told that the damages which it may award must be the direct result of the occurrence. The word "direct" adds a limiting factor not otherwise included.

Brown v. *St. Louis Public Service Company*, 421 S.W.2d 255, 257 (Mo. banc 1967); *see also, Chappell* v. *City of Springfield*, 423 S.W.2d 810, 812 (Mo. 1968) (citing *Brown, supra*). Therefore, as the Missouri Supreme Court sees it, in all except F.E.L.A. cases, failure to use the adjective "direct" to modify "result" in instructing a jury on the proper scope of damages, is to allow that jury to consider elements of damage not directly or proximately resulting from plaintiff's injury which was caused by the defendant's acts. Yet the Missouri Supreme Court finds the omission of the word "direct" is not only proper, but *required*, by federal law when instructing the jury on damages in an F.E.L.A. case.

There are at least two substantial and injurious ramifications of the present language of M.A.I. 8.02. First, an F.E.L.A. plaintiff's burden of proof on damages is altered by making it less than the burden intended by Congress and less than it has been interpreted to be by this Court. Second, F.E.L.A. defendants are erroneously subjected to a jury's propensity to speculate and the instruction permits them to make awards on the basis of damages not proximately caused by the injury for which plaintiff seeks recovery.

Yet another prejudice is occuring because although the personal injury defendants in F.E.L.A. cases are subjected to M.A.I. 8.02, which does not limit damages to those directly resulting from the injury, defendants in wrongful death F.E.L.A. cases are not. M.A.I. 8.01, which is the damage instruction in F.E.L.A. wrongful death cases, provides in pertinent part as follows:

> 8.01 Damages - Death of Employee under F.E.L.A.
>
> If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate (list the beneficiary; i.e., the widow, minor children, parents, etc.). For (her, his, their) losses which can reasonably be measured in money which you believe

(she, he, they) sustained as a *direct* result of the death of (name of decedent) [and if you believe decedent endured pain and suffering *directly* resulting from his injuries then in addition you must add to such sum an amount that would have fairly and justly compensated decedent for such pain and suffering.]. . . (Footnotes omitted) (emphasis added).

There is no reason in case law or logic to distinguish the requisite causal connection for damages in an F.E.L.A. personal injury case from those in an F.E.L.A. wrongful death case. Furthermore, since the question is one of federal law, personal injury F.E.L.A. defendants are being denied equal protection under the law by the State of Missouri through its Supreme Court. As a practical matter, comparison of M.A.I. 8.01 and 8.02 shows that the Missouri Supreme Court misunderstands the F.E.L.A. on the issue of the required causal connection between the injury and damage claimed to result therefrom. Petitioner asserts that this misunderstanding denies its rights under federal law and discriminates unconstitutionally between personal injury F.E.L.A. defendants and wrongful death F.E.L.A. defendants.

III. The Missouri Supreme Court In *Bair* v. *St. Louis-San Francisco Railway Company*, 647 S.W.2d 507 (Mo. banc 1983), Has Held That It Is Not Reversible Error For A Trial Court To Exclude In An F.E.L.A. Case, Evidence Of The Non-Taxability Of The Damage Award, Or To Refuse A Tendered Jury Instruction That Any Damage Award Would Not Be Subject To Income Tax And Therefore The Missouri Supreme Court Has Decided A Federal Question -Measure Of Damages In An F.E.L.A. Case - In A Way In Conflict With Decisions Of This Court, Notably, *Norfolk & Western Railway Company* v. *Liepelt*, 444 U.S. 490 62 L.Ed.2d 629, 100 S.Ct. 755 (1980).

Since this Court's decision in *Norfolk & Western Railway Company* v. *Liepelt*, 444 U.S. 490 62 L.Ed.2d 689, 100 S.Ct.

755 (1980), both state and federal courts have been limiting, indeed cutting back, on its holding. In *Liepelt,* the Court was faced with a case where Norfolk and Western Railway Company, an F.E.L.A. defendant, attempted to introduce evidence on, and attempted to instruct the jury that, the damage award to plaintiff would not be subject to income tax. This court held that the measure of damages in an F.E.L.A. action is federal in character, even if the action is brought in state court. *Norfolk & Western Railway Company* v. *Liepelt,* 444 U.S., at 493, 62 L.Ed.2d, at 693. Rejecting the notion that there is risk of confusing the jury with "income tax" evidence and a like instruction, this court held it was error to refuse the request for the instruction. *Id.,* at 498.

Therefore, the Court clearly and unequivocally established an F.E.L.A. defendant's right to introduce evidence on the nontaxability of an award and the right to an "income tax" instruction to the jury. In spite of this controlling decision, the Missouri Supreme Court, in the *Bair* case below, has held that the trial court's refusal to allow the introduction of evidence on the income tax issue and its refusal of a tendered income tax instruction was not prejudicial error, and therefore no reversal or retrial was required. In so doing, the Missouri Supreme Court relied on *Flanigan* v. *Burlington Northern Inc.,* 632 F.2d 880 (8th Cir. 1980), *cert. denied* 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed.2d 349 (1981), for the proposition that the size of the verdict did not show prejudice had occurred in the absence of the "income tax" instruction. *Bair* v. *St. Louis-San Francisco Railway Company,* 647 S.W.2d at 512. A close reading of *Flanigan* shows, however, that it distinguished itself from *Liepelt* as follows:

> The Supreme Court found in *Liepelt* the failure to give the cautionary instruction on the non-taxation of the award was error. However, the court also found error in failing to allow the defendant railroad to prove through its economist the projected net earnings after taxes. *On this*

> *combination of error,* the court found the error to be prejudicial requiring a new trial. (emphasis added)

Flanigan v. *Burlington Northern Inc.*, 632 F.2d at 889.

The Missouri Supreme Court's statement in *Bair* that the size of the jury verdict may be employed to determine whether prejudice has occurred results in the ultimate whipsaw to a litigant who, like Petitioner herein, as dutifully asserted its rights under federal law and attempted to introduce evidence and submit an instruction on the income tax issue. This Court's observations in *Liepelt* about the size the verdict illustrates its position that the instruction, if requested, should be given and if not given, should result in a reversal of the case.

> It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery. *Whether or not this speculation is accurate,* we agree with Petitioner that, as Judge Ely wrote for the Ninth Circuit,
>
> > [t]o put the matter simply, giving the instruction can do no harm, and it certainly can help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable.
>
> (Citations omitted) (emphasis added).

Norfolk & Western Railway Company v. *Liepelt,* 444 U.S. at 497-498; *O'Byrne* v. *St. Louis Southwestern Railway Company,* 632 F.2d 1285, 1287 (5th Cir. 1980), also interprets *Liepelt* this way. The language in *Liepelt* requires a reversal where, as in this case, the trial court has denied an F.E.L.A. defendant its right under federal law to introduce evidence and has refused a tendered jury instruction on the "income tax" issue. To allow this issue to fall here and go no further will be to emasculate

Liepelt because every trial court will know that it can, without fear of reversal, exclude evidence and deny an instruction on the non-taxability of damages. This court should follow through with the mandate of *Liepelt*. The case of Petitioner herein is genuinely within the *Liepelt* decision[1] and therefore, this court should allow the Writ of Certiorari to issue on this ground.

IV. The Missouri Supreme Court's Mandate That M.A.I. 24.01, The Verdict Director In F.E.L.A. Cases Tried In The State Courts Of Missouri, Be Used In Every F.E.L.A. Case, Denies F.E.L.A. Defendants Due Process Of Law And Equal Protection Under The Law Because It Does Not State A Specific Act Of Negligence On The Defendant's Part And Therefore Is A Roving Commission For The Jury, And Prevents The Defendant From Being Put On Notice Of The Alleged Negligence Against Which It Is To Defend And Furthermore This Violates The Supremacy Clause In Article 6, Clause 2 Of The Constitution Of The United States Because It In Effect Pre-empts The Federal Law With Regard To What A Proper Instruction Is.

The trial court in this case submitted to the jury, M.A.I. 24.01 (modified for this case) as follows:

> Your verdict must be for plaintiff if you believe:
>
> First, defendant either failed to provide: reasonably safe conditions for work, or reasonably safe methods of work, and

---

[1] *Cf. Vanskike* v. *ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981), where no income tax instruction was actually tendered and therefore the court reviewed for plain error and did not reverse. 665 F.2d at 206, n. 14; *Flanigan* v. *Burlington Northern Inc.*, 632 F.2d 880 (8th Cir. 1980), has already been distinguished in the text; *Marynik* v. *Burlington Northern Inc.*, 317 N.W.2d 347 (Minn. 1982), where the court employed the *de minimis* exception referred to in *Norfolk and Western Railway Company* v. *Liepelt*, 444 U.S. at 494, n. 7, 62 L.Ed.2d. at 694, n. 7, in order to avoid reversing in the judgment.

> Second, defendant in any one or more of the respects submitted in paragraph first was negligent, and
>
> Third, such negligence resulted in whole or in part in injury to plaintiff.

Quite simply, Petitioner's argument against the validity of this instruction is that it is vague and allows the jury to arrive at a general *conclusion* about the fact pattern of the case without having determined whether the facts of the case are as plantiff argues them to be and therefore warrant recovery. An F.E.L.A. defendant in Missouri state courts cannot present an adequate defense against such an instruction because it is forced to defend against any and every issue of negligence made by plaintiff at any time during trial. Moreover, without being forced to agree on whether a specific act or acts by the F.E.L.A. defendant was negligent and caused plaintiff's injury, a jury is more likely to find against the railroad.

All Petitioner seeks is to have an F.E.L.A. verdict directing instruction that comports with the instruction philosophy of the Missouri Supreme Court in all other cases and with that of federal courts. This is accomplished by setting out specifically for the jury what plaintiff's theory of recovery is, under the evidence of the case. Such instructions are the rule, rather than the exception. *E.g., Hite* v. *Western Maryland Railway,* 217 F.2d 781, 782 (4th Cir. 1954) *cert. denied,* 349 U.S. 960, 99 L.Ed. 1283, 75 S.Ct. 890 (1955); *Chicago, Rock Island and Pacific Railroad Company* v. *Lint,* 217 F.2d 279, 286-287 (8th Cir. 1954); *Terminal Railroad Association of St. Louis* v. *Fitzjohn,* 165 F.2d 473, 480 [12, 13] (8th Cir. 1948) (jury charge stated that plaintiff's theory was that he was injured as a result of having been knocked from a car by a standard placed too close to the tracks and therefore defendant was negligent for failing to provide a reasonably safe place to work.)

Petitioner realizes that as a general rule, questions regarding jury instructions are procedural and solely of state concern

because they involve how the law is submitted to the jury. However, where as here, the instructions infringe upon the substantive right of a party to present an adequate defense, the issue is one of substantive federal law in the form of due process. *Wounick* v. *Hysmith*, 423 F.2d 873 (3d Cir. 1970). Furthermore, if the matter is solely for the State of Missouri to control, then defendants in F.E.L.A. actions are being discriminated against by the Missouri Supreme Court's mandate for the exclusive use of M.A.I. 24.01, because under Missouri law, non-F.E.L.A. defendants have the right to have specific acts of negligence set out in the verdict director. Otherwise it would be a roving commission for the jury. *Ricketts* v. *Kansas City Stockyards of Maine*, 484 S.W.2d 216, 222 (Mo. banc 1972) (Court states that it is reversible error to use M.A.I. 24.01 in "usual" negligence cases because it does not submit "any condition as not being reasonably safe.", at 222). Somehow, the Missouri Supreme Court has gotten the idea that the lower, statutorily created, causation standard in the F.E.L.A. means that plaintiff need not submit to the jury his theory of the case with specific facts he alleges are true and which point to defendant's negligence being a cause of his injury. This is simply a non-sequitur and results in F.E.L.A. defendants being denied due process and equal protection under federal law. Because Missouri Supreme Court Rule 70.02(b) requires that an M.A.I. instruction (here 24.01) be used to the exclusion of all others it is quite apparent that the State of Missouri is bringing about this result.

Petitioner further submits that rule 70.02(b) and M.A.I. 24.01 violate its rights under Article 6, Clause 2 of the Constitution of the United States, the supremacy clause. Under the F.E.L.A., 45 U.S.C. §51, defendants are liable only for negligence. The jury is mandated to decide whether given acts or omissions are negligent. What factual situations give rise to a permissible finding of negligence and even questions of damages therefrom are federal questions governed by federal law. *Nor-*

folk and Western Railway Company v. *Liepelt,* 444 U.S. 490 100 S.Ct. 755, 62 L.Ed.2d 689 (1980); *Urie* v. *Thompson* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). By virtue of Rule 70.02(b) and M.A.I. 24.01, Missouri has pre-empted the federal law and, in effect, permitted the jury to decide that an F.E.L.A. defendant is negligent without requiring any finding that any particular act or omission, or combination thereof on the part of any such defendant constitutes negligence. Likewise, plaintiffs are relieved of the necessity of proving a duty, breach thereof, and scienter with regard to any particular circumstances. This has the practical effect of taking away defendant's rights granted by the F.E.L.A. contrary to the Supremacy Clause above cited.

This Court's Writ of Certiorari should be allowed to issue to the Missouri Supreme Court because this case involves the right of a defendant to be shielded from responsibility under the F.E.L.A. which under that statute is not properly placed upon it. *Seaboard Air Line Railway* v. *Padgett,* 236 U.S. 668, 35 S.Ct. 41, 59 L.Ed. 777 (1915).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be allowed to issue from this Court to the Supreme Court of the State of Missouri.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition for Writ of Certiorari and Appendices A through I were hand delivered to the office of C. Marshall Friedman, Attorney for Respondent, 818 Olive Street, St. Louis, Missouri, by the undersigned this 27th day of June, 1983.

GERALD D. MORRIS

APPENDIX

APPENDIX A

James C. Bair,
Plaintiff-Respondent,

v.

St. Louis-San Francisco
Railway Company,
Defendant-Appellant.

No. 64246.

SUPREME COURT OF MISSOURI,
EN BANC.

Feb. 23, 1983.

On Rehearing March 29, 1983.

BLACKMAR, Judge.

Respondent James Bair brought suit for damages in the Circuit Court of the City of St. Louis pursuant to the Federal Employers' Liability Act against appellant St. Louis-San Francisco Railway Company (Frisco). Bair claimed that he had sustained injuries while working as a journeyman carman for Frisco. The jury returned a verdict in Bair's favor for $313,500, and judgment was entered on the verdict. The Missouri Court of Appeals, Eastern District, affirmed. We transferred the case, primarily to resolve the question of retroactivity of a decision of the Supreme Court of the United States regarding income tax effects of damage awards in F.E.L.A. cases. We decide the case as on original appeal, and affirm the judgment. We make use of substantial portions of the opinion of Judge Simon, without quotation marks.

On appeal Frisco raises ten points, alleging that the trial court erred in: (1) refusing to allow Frisco to ask Bair on cross-examination if he was aware that any recovery on his claim would not be subject to federal income tax; (2) refusing to in-

struct the jury that Bair would not have to pay federal income tax on any jury award he might receive; (3) refusing to submit to the jury a "present value" instruction; (4) submitting to the jury MAI No. 8.02 as the damage instruction; (5) refusing to submit to the jury an instruction pertaining to speculative damages; (6) submitting to the jury MAI No. 24.01 as the verdict director; (7) failing to grant a mistrial after Bair testified that he had a family to support; (8) failing to grant a mistrial after Bair's attorney made unfavorable comments about Frisco's examining physician; (9) failing to grant a new trial after Bair's attorney made unfavorable comments during his closing argument about Frisco's attorney; (10) failing to grant a new trial on the ground that the damages were excessive.

I.

We believe that all of appellant's points except (1), (2) and (10) were appropriately disposed of in the Court of Appeals opinion.

At the time Bair sustained his injuries he was 30 years old. He had started working for Frisco in its Springfield, Missouri train yard after graduating from high school in 1960. Bair began as a carman apprentice; he was promoted to the position of journeyman carman approximately four years later. Carmen are skilled workers who build, repair, and service various types of railroad cars and equipment. Bair testified that during the course of his employment with Frisco he had learned every phase of the carman's craft.

The evidence adduced at trial showed that on January 18, 1973 Bair was working in Frisco's freight car shop repairing damaged freight cars. Bair and several co-workers were assigned the job of working on a damaged boxcar in the process of being rebuilt. One end of the boxcar had being pushed inward one to two feet. Bair's supervisor, Michael Beavers, told the workers to straighten the end using a large air-powered jack and pole. This method of straightening the end required that one of the

workers go inside the boxcar with the jack and a six to ten foot pole. Basically, the idea was to use the jack to push the pole against the indentations on the end of the boxcar. The jack, weighing between three and four hundred pounds, had wheels on its bottom but becuase it was wider than the centersill, it had to be positioned on its side by hand. Once the jack was in place it would be tied to the centersill and braced so that the jack would not move when pressure was applied to the indentations. As the pole was pushed against the end of the boxcar it was necessary to reposition the jack.

Bair went into the boxcar with the three to four hundred pound jack and a six to ten foot oak pole. Both the boxcar's flooring and the steel "stringers" on which the flooring sits had been removed. The only surface on which Bair could stand inside the boxcar was the centersill, running lengthwise down the middle of the car. The centersill is approximately fourteen or fifteen inches wide. There is a two inch flange on each side of the centersill approximately twelve or thirteen inches below the centersill's surface.

Before Bair went inside the boxcar the workers requested some plywood be placed in the car so that there would be more room to stand. The request was denied. As a result there was room for only one man inside the car to reposition the jack. Bair had moved the jack twice before he was injured. At trial Bair described his attempt to move the jack for a third time:

> [a]s I was tugging on the jack—of course, it's a very strenous (sic) process, just brute strength—and I pulled on it and something popped or just—I got a severe pain in my back. It just stopped me. And I just let go and got up and crawled. I couldn't get up. The pain was so severe that it scared me.

Bair was first taken to the shop's office then to the office of Dr. Carl Schroff, the Frisco doctor. Dr. Schroff examined Bair and took X-rays of Bair's lower back. Dr. Schroff gave Bair a

muscle relaxer and told him to return the next day, Friday. When he returned to Dr. Schroff's office, Bair was still in pain. Dr. Schroff advised Bair to rest over the weekend and told him that he could return to light duty on Monday. Bair did return to work, but the pain in his back continued.

Soon after Bair returned to work he transferred to the air brake shop because it required less heavy lifting. Bair's back, however, did not improve; the pain continued. During the next two years Bair went to several doctors. In October of 1975 Bair transferred again, taking a job as an inspector in the train yards. Two days later on October 29, 1975, Bair's doctor put him in the hospital for 11 days for tests and therapy. Bair has not returned to work for Frisco. In January of 1975 Bair again entered the hospital for more treatment. Bair suffers from a degenerative disc disease. Bair's present doctor, an orthopedic surgeon, Dr. Ben Harmon, testified by deposition that Bair was not capable of returning to work. Although Bair tried to return to work with his father as a painter and remodeler, he was unable to perform due to his back problems. Bair stated that in 1976 he had no earnings. In 1977 he earned $1,700. In 1978 Bair obtained a real estate license and earned $4,500.

[1] Several of the points advanced in the brief and renewed here relate to errors in instruction, in which it is argued that MAI does not furnish an appropriate guide. We are always willing to entertain claims of legal error in MAI instructions, including, in F.E.L.A. cases, claims that instructions are contrary to governing federal law. Most of the points here advanced, however, were disposed of in our opinion in *Dunn* v. *St. Louis-San Francisco Ry. Co.*, 621 S.W.2d 245 (Mo. banc 1981), *cert. denied*, 454 U.S. 1145, 102 S.Ct. 1007, 71 L.Ed.2d 298 (1982). We adhere to that opinion, and to the general MAI plan of instruction, which seeks to simplify and balance the instruction process. There are instructions which are abstractly correct in law and which are commonly given in some jurisdictions, but which are not included in the MAI plan. The absence of an instruction does not prevent counsel from introducing evidence or making argument.

[2] Frisco's third point is that the trial judge erred in refusing to submit to the jury a present value instruction. In *Dunn*, at p. 253, we dealt with a very similar issue and held that a present value instruction was not appropriate under MAI. We are not persuaded that federal law requires the instruction. Frisco's third point is denied.

[3] Frisco's fourth point is that the trial court erred in submitting MAI No. 8.02 as the damage instruction. Frisco assigns two reasons for its contention. First, it contends that the instruction failed to limit the jury's consideration to the occurrence of January 18, 1973. Second, Frisco contends MAI No. 8.02 misstates the applicable law of damages for F.E.L.A. cases. Neither of these contentions has merit.

Under MAI when there is more than one occurrence, the jury must be instructed to consider only the occurrence for which defendant is liable. In this case Frisco contends the trial court erred because the damage instruction did not limit the jury's consideration to the occurrence of January 18, 1973. There was some evidence at trial that Bair had sustained several minor injuries prior to that date. However, the extensive medical testimony indicated that the accident sustained January 18, 1973 caused the complained of injuries to Bair's back. *See Weinbauer* v. *Berberich*, 610 S.W.2d 674, 680 (Mo.App.1980); *Gant* v. *Scott*, 419 S.W.2d 262 (Mo.App.1967). Thus, the trial court was not required to modify, nor was Frisco prejudiced by, the damage instruction. The trial court correctly submitted MAI No. 8.02. This instruction is mandatory to the exclusion of all others under the MAI. *Griffith* v. *St. Louis-San Francisco Ry. Co.*, 559 S.W.2d 278, 280 (Mo.App.1977), *cert. denied*, 436 U.S. 926, 98 S.Ct. 2821, 56 L.Ed.2d 769 (1978). We do not believe that the jury was confused as to the incident involved.

[4] Frisco's fifth point is that the trial court erred in refusing to submit a speculative damage instruction. Frisco's tendered instruction was not contained in MAI and "[a]s such it [was]

contrary to the scheme of MAI and presumptively prejudicial." *McBee* v. *Schlupbach*, 529 S.W.2d 435, 439 (Mo.App.1975). See *Dunn, supra* at 253.

[5] Frisco's sixth point is that the trial court erred in submitting the verdict director, MAI No. 24.01. The submission of MAI No. 24.01 was proper, and in fact required under Supreme Court Rule No. 70.02(b). *See White* v. *St. Louis-San Francisco Ry. Co.*, 602 S.W.2d 748, 754 (Mo.App.1980). *See also* the extensive Committee Comment to MAI No. 24.01. This point is denied.

[6] Frisco's seventh point on appeal is that the trial court erred in refusing Frisco's request to grant a mistrial after Bair volunteered, on direct examination, that he had a family to support.[1] The court instructed the jury to disregard Bair's remark. We hold the trial court acted well within the bounds of its discretion.

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[1] The exchange between counsel and Bair went as follows:

"Q Of what importance to you has been your training in your profession, your career?

A Well, I spent the biggest part of my life working for the railroad and that's my livelihood. I don't have any more. I have a family to support."

The situation in the present case is analogous to that in *Brown* v. *Parker*, 375 S.W.2d 594 (Mo.App.1964). In both cases the testimony regarding the plaintiffs' families was contained in an unresponsive answer on direct examination. In *Brown* the Court of Appeals held:

> [W]here improper evidence comes into the case through a voluntary statement of a witness, a mistrial is not a matter of right but is a question calling for the exercise of a sound discretion by the trial court, and in the absence of an abuse of that discretion we cannot interfere.

Brown, supra at 601. The trial court's refusal to grant a mistrial was not an abuse of discretion as evidenced by the fact that Bair had previously testified without objection that he had a wife and family. Moreover, later in the trial Dr. Harmon, under cross-examination by Frisco, alluded to Bair's sons. Based on these factors we hold that the trial court did not abuse its discretion in refusing to grant a mistrial.

[7,8] Frisco's eighth point concerns statements made by Bair's attorney about Frisco's examining physican, Dr. Mell. The comments were made during Frisco's cross-examination of Dr. Winer, a medical witness for Bair. By consent of all parties, Dr. Mell had already testified. Frisco's attorney questioned Dr. Winer about the frequency that he sees patients at the request of Bair's attorney. At this point, Bair's attorney said that Dr. Winer did not see as many people for him as Dr. Mell sees for Frisco. Bair's attorney later apologized in open court for his remark. Both comments were within the hearing of the jury. The trial court rightly instructed the jury to disregard both comments. Frisco contends that Bair's attorney, by his remarks, intended to go beyond the record to case aspersions on Dr. Mell and that the trial court erred in not granting its request for a mistrial. We do not think the trial court abused its discretion in refusing Frisco's request.

The trial court's decision whether to declare a mistrial must be based on the nature of the comments made and the circumstances in which the comments were made. *Compare Dunn* v. *Terminal R. Ass'n,* 285 S.W.2d 701 (Mo.1956) *with Donk* v. *Francis,* 351 Mo. 1053, 174 S.W.2d 840 (1943). The *Donk* case is especially analogous to the present case. In *Donk* defendant's attorney commented to plaintiff, "your lawyer, doctor and you seem to work pretty well together." *Id.* 174 S.W.2d at 843. Defendant's attorney apologized for this remark and the trial court directed the jury to disregard the remark. This Court held the trial court did not abuse its discretion in refusing to declare a mistrial. In the case at bar remarks by Bair's attorney, while im-

proper, did not rise to the level as that made in *Donk*. Under the circumstances, we cannot say the trial court abused its discretion. Frisco's eighth point is denied.

[9] Frisco's ninth point is that the trial court erred in refusing to grant a new trial because of a comment made by Bair's attorney in closing argument. Bair's attorney began his closing argument:

> Ladies and gentlemen, you have heard an argument which, in my opinion, just about comes about as close as you could get to the bottom, to the pits. Mr. Morris has told you about all these cases he's tried against me. And I'll guarantee you right here if you were to read the transcripts of those cases that are typed up by this court reporter, you will read the same argument in every single case he tries, that he gave to you right here today. It is a script. Every single case is the worse case he's ever seen; in every single case there's nothing to believe; in every single case, the doctors are confused, and every single case you should blame everything [and] anyone but the railroad.

We do not feel that the trial court abused its discretion in refusing to grant a new trial. Frisco's attorney, in closing argument, had gone beyond the record and discussed his prior experiences. In considering whether to grant a new trial, the trial court considered both arguments together. *Clark* v. *Mize*, 525 S.W.2d 635, 637 (Mo.App.1975). Considering the liberal attitude toward closing argument, the trial court's considerable discretion and the fact that both attorneys brought in personal experiences in closing argument, we conclude that the trial court was not in error in refusing to grant a new trial.

II.

The defendant's first two points complain of the court's refusal to allow evidence of or to instruct the jury on the fact that any award of damages would not be subject to income tax.

Such an instruction is now required in F.E.L.A. cases by *Norfolk & Western Ry.* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). We held in *Dunn* v. *St. Louis-San Francisco Ry., supra,* that *Liepelt* was not to be applied retroactively and the Court of Appeals considered itself bound by that decision even though the Supreme Court in the meantime had decided *Gulf Offshore Co.* v. *Mobil Oil Company,* 453 U.S. 473, 486 fn. 16, 101 S.Ct. 2870, 2879 fn. 16, 69 L.Ed.2d 784 (1981), in which the Court characterized the claim that *Liepelt* was not retroactive as "insubstantial."

[10] The *Gulf Offshore* holding is clear enough to us. *Liepelt* must be applied retroactively if an instruction on the tax consequences of an award has been requested. This does not mean, however, that a total or partial new trial must be granted in every case tried before *Liepelt,* simply because a *Liepelt*-type instruction was requested and was not given. It is appropriate for the lower courts, state and federal, to examine the verdicts rendered to determine whether the absence of an instruction on income tax effects was prejudicial.

In *Flanigan* v. *Burlington Northern, Inc.,* 632 F.2d 880 (8th Cir. 1980), *cert. denied,* 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed.2d 349 (1981), the court held that *Liepelt* was retroactive, but concluded that the verdict was supported by the evidence and that there was no indication that the jury had inflated its award because of erroneous assumptions about tax consequences. The court pointed to the particular circumstances of *Liepelt,* a death case, and noted that the amount of the *Liepelt* verdict was well in excess of the figures produced by objective analysis. *Id.* at 890. Had the Supreme Court felt that new trials in pending cases were automatic, following *Liepelt,* it is probable that it would have vacated the *Flanigan* judgment, as well as those in *Dunn* and in *Ingle* v. *Illinois Central Gulf Ry. Co.,*

608 S.W.2d 76 (Mo.App.1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341 (1981).[2]

Appellant argues that the great weight of authority is contrary to *Flanigan, Dunn* and *Ingle*. We nevertheless elect to follow the *Flanigan* model. A new trial is burdensome to the parties and to the judicial system. This is especially so when the claim arose ten years ago. We believe that we have not only the power but the positive duty to examine the verdict to determine whether retrial is necessary.

[11] The record and the briefs before us show substantial disagreement as to the cause and extent of the plaintiff's difficulties. The plaintiff's evidence, which the jury obviously accepted, showed that his earnings were substantially reduced following the accident and that, after trying to do some railroad jobs, he was able to earn very little. His ability to move was severely restricted and he suffered continuing pain. The jury could well have believed that his earnings capacity had been permanently impaired. Defendant argues that the award could be expected to yield an annual income of approximately $25,000, which is more than the plaintiff could be expected to earn if he had been able to continue with his railroad employment. There are, however, other proper components of the verdict, including pain and suffering. *See Flanigan* at 890. Neither the trial court nor the Court of Appeals was disturbed by the size of the verdict, and we conclude, after reviewing the record, that it was within reasonable limits. We also conclude that it is unlikely that the jury inflated its verdict because of a mistaken assumption that the award would be subject to income taxation.

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[2] Plaintiff argues that the ultimate disposition of *Gulf Offshore Company* v. *Mobil Oil Corporation*, 625 S.W.2d 171 (Tex.App.1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 259, 74 L.Ed.2d 202 (1982), affirming a verdict for the plaintiff even though a *Liepelt* instruction had not been given, is significant. This is not so. The case was not a F.E.L.A. case but rather involved another federal statute, and the Texas court held that the statute adopted state law.

We do not believe that the interests of justice require a new trial, total or partial. The judgment is affirmed.

WELLIVER, HIGGINS and BILLINGS, JJ., and MORGAN, Senior Judge, concur.

RENDLEN, C.J., and DONNELLY, J., not participating.

GUNN, J., not sitting.

ON MOTION FOR REHEARING

PER CURIAM.

The appellant's motion for rehearing for the most part raises points which were presented in its briefs, but the motion does claim that the opinion is inconsistent with one point discussed in *Dunn*, which, according to the motion, held that defendants were precluded from arguing that an award for loss of future earnings should be reduced to present value. *See* 621 S.W.2d 245, 254 (Mo. banc 1981).

The holding in *Dunn* related to a combined argument about present value and income tax, under the assumption that *Norfolk and Western Railway Company* v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), was not to be applied retroactively. We have now held to the contrary but felt that reversal is not required in this case.

[12] *Dunn* should not be read as holding that argument on present value of a future loss is not proper. Recent cases recognize the admissibility of economic evidence in evaluating damages. *Sampson* v. *Missouri Pacific Railway Co.*, 560 S.W.2d 573, 587 (Mo. banc 1978); *Raney* v. *Honeywell, Inc.*, 540 F.2d 932, 936 (8th Cir.1976). The issue of the present worth of a future loss could undoubtedly be presented on cross-examination of a claimant's expert witnes, or through an expert called by the defense. The fact that a dollar today is not the

same as a dollar payable some years from now, furthermore, is the matter of plainest fact which could be appropriately argued without the need for expert testimony.

The motion for rehearing is denied.

RENDLEN, C.J., and GUNN and DONNELLY, JJ., not participating.

APPENDIX B

Rule 83.08. Transcripts—Briefs in Cases Transferred After Opinion

In any case transferred to this Court after opinion, the parties shall retain the same position as appellant and respondent as in the Court of Appeals, and the transcript and brief filed in the Court of Appeals shall constitute the transcript and briefs in this Court. Any party may file an additional brief if he so desires.

APPENDIX C

POINTS RELIED ON
[As submitted by Petitioner before the Missouri Court of Appeals, and then before the Missouri Supreme Court]

I.

THE TRIAL COURT PREJUDICIALLY ERRED IN SUSTAINING PLAINTIFF'S OBJECTION THERETO AND IN REFUSING TO PERMIT DEFENDANT TO ASK PLAINTIFF ON CROSS-EXAMINATION IF PLAINTIFF WAS AWARE THAT NO INCOME TAX WOULD BE DUE ON ANY AWARD PLAINTIFF MIGHT RECEIVE FROM THE JURY. THE TRIAL COURT SHOULD HAVE OVERRULED PLAINTIFF'S OBJECTION THERETO AND PERMITTED THE INQUIRY BECAUSE PLAINTIFF WOULD HAVE ACKNOWLEDGED THAT HE KNEW HE WOULD HAVE TO PAY NO INCOME TAX ON HIS JURY AWARD, THUS ACKNOWLEDGING TO THE JURY THAT NO SUCH TAX WOULD BE DUE AND THEREBY ELIMINATING AS MUCH AS POSSIBLE ANY LIKELIHOOD THAT THE JURY MIGHT INCLUDE AN AMOUNT FOR INCOME TAXES IN THEIR AWARD.

II.

THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING DEFENDANT'S TENDERED INSTRUCTION C, WHICH WAS TO THE EFFECT THAT ANY JURY AWARD PLAINTIFF MIGHT RECEIVE WAS NOT SUBJECT TO INCOME TAX. THE TRIAL COURT SHOULD HAVE GIVEN INSTRUCTION C. HIS FAILURE TO GIVE IT SUBJECTED DEFENDANT TO THE LIKELIHOOD THAT THE JURY AWARD INCLUDES AN AMOUNT FOR INCOME TAXES. HAD HE GIVEN INSTRUCTION C, THAT ELEMENT WOULD HAVE BEEN ELIMINATED FROM THE JURY AWARD.

III.

THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING DEFENDANT'S TENDERED INSTRUCTION A, A "PRESENT VALUE" INSTRUCTION. THE TRIAL COURT SHOULD HAVE GIVEN INSTRUCTION A. HIS FAILURE TO GIVE THE INSTRUCTION DENIED DEFENDANT OF ONE OF ITS RIGHTS AS A DEFENDANT UNDER THE FEDERAL EMPLOYERS LIABILITY ACT; NAMELY, THE RIGHT TO HAVE THE JURY CONSIDER THE PRESENT VALUE OF ANY AWARD FOR FUTURE WAGE LOSS.

IV.

THE COURT PREJUDICIALLY ERRED IN GIVING PLAINTIFF'S TENDERED INSTRUCTION NO. 7, THE DAMAGE INSTRUCTION, WHICH IS M.A.I. 8.02. THE COURT SHOULD HAVE REFUSED THE INSTRUCTION BECAUSE IT FAILED TO LIMIT THE JURY'S CONSIDERATION TO THE OCCURRENCE OF JANUARY 18, 1973, THE ONLY OCCURRENCE FOR WHICH DEFENDANT COULD HAVE BEEN LIABLE. FURTHER, THE INSTRUCTION IS A MISSTATEMENT OF THE LAW OF DAMAGES APPLICABLE TO THIS FELA CASE FOR THE REASON THAT IT DIRECTS THAT DEFENDANT IS LIABLE FOR INDIRECT, CONSEQUENTIAL, SPECULATIVE, AND REMOTE DAMAGES. BECAUSE THE USE OF SAID INSTRUCTION IS COMPELLED BY RULE 70.02(b), THE STATE, THROUGH ITS JUDICIARY, IS THEREBY DENYING DEFENDANT EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW IN VIOLATION OF THE UNITED STATES AND MISSOURI CONSTITUTIONS AND ALSO DENYING DEFENDANT ITS RIGHTS UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

V.

THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING DEFENDANT'S TENDERED INSTRUCTION E, PERTAINING TO SPECULATIVE DAMAGES. THE TRIAL COURT SHOULD HAVE GIVEN INSTRUCTION E BECAUSE IT IS A CLEAR STATEMENT OF ONE OF DEFENDANT'S RIGHTS UNDER THE FELA; NAMELY, THE RIGHT TO HAVE SPECULATIVE DAMAGES EXCLUDED FROM ANY JURY AWARD TO PLAINTIFF.

VI.

THE COURT PREJUDICIALLY ERRED IN GIVING PLAINTIFF'S TENDERED INSTRUCTION NO. 3, THE VERDICT DIRECTOR, M.A.I. 24.01. THE COURT SHOULD HAVE REFUSED SAID INSTRUCTION BECAUSE IT IS A ROVING COMMISSION AND SO VAGUE AS TO GIVE THE JURY NO GUIDANCE ON THE ISSUE OF WHETHER OR NOT THERE ARE FACTS IN EVIDENCE GIVING RISE TO A PERMISSIBLE FINDING OF NEGLIGENCE ON DEFENDANT'S PART. BECAUSE THE USE OF SAID INSTRUCTION IS COMPELLED BY RULE 70.02(b), THE STATE OF MISSOURI, THROUGH ITS JUDICIARY, IS DEPRIVING DEFENDANT OF ITS RIGHTS TO EQUAL PROTECTION UNDER THE LAW AND DUE PROCESS OF LAW UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS AND DEFENDANT IS BEING DENIED ITS RIGHTS UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

APPENDIX D

Rule 70.02. Instructions to Juries.

* * *

(b) **Missouri Approved Instructions Exclude Others.** Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

* * *

Rule 70.03. Objections to Instructions

Counsel need not object to any instructions to be given at the request of any other party or by the court on its own motion or to the refusal of any instruction requested by such party. Specific objections to instructions shall be required in motions for new trial unless made at trial. The making of objections during trial shall not preclude making additional objections to the same or other instructions in the motion for new trial. No general objection to instruction is required.

APPENDIX E

[James C. Bair, Plaintiff v. St. Louis-San Francisco Railway Company, Defendant, Cause No. 55645-F, Division 11, in the Circuit Court of Missouri, Twenty-Second Judicial Circuit, Hon. Richard J. Brown, Judge, Transcript on Appeal, Vol. II, pp. 585-589; from conference on jury instructions].

* * *

[585] At the close of the entire case, the Defendant filed it's motion for a directed verdict. The Court overruled the same.

Court was declared in recess until 9:15, Friday, November 2, 1979. And on Friday, November 2, 1979, the following proceedings were had in chambers).

MR. MORRIS: Your Honor, on behalf of the defendant, at this time, at the instruction conference, during the course of this trial I want to take this opportunity—the first and earliest opportunity I have had—to make specific certain specific objections to specific instructions offered by the plaintiff in which the Court has given on behalf of the Plaintiff.

And I don't intend by so making specific objections now to certain instructions to waive any right that I may have under the law or under the rules to make objections later on.

But, at this time, I'd like to make a [586] specific objection to Instruction No. 3, which is the verdict directing instruction; and in which the plaintiff submits two grounds of negligence against the defendant, namely: reasonably safe conditions for working or reasonably safe methods of working. The reason I want to object to that instruction and those submissions, on the grounds that that instruction is vague and speculative. It is a roving commission and it discriminates against the railroad defendants in the State of Missouri. And I want to object

specifically that it includes the question of whether or not the boxcar end should have been removed and straightened at some other place which the defendant submits is a management question.

I want to submit and object that the instruction because of its vagueness, because it's limited to the F.E.L.A. case, and because it does not meet the standards of instructions required by the Courts of the State of Missouri, is in violation of the defendant-railroad under the equal protection of the laws of the United States Constitution, 14th Amendment, and the Missouri Constitution, Article I, Section 2, in that by giving this instruction the defendant is being deprived of his property without due process of law in violation of the 5th Amendment [587] of the United States Constitution and the Missouri Constitution, Article I, Section 10. And, again, I want to renew my objections that the instruction includes the question of removal of the boxcar end, permits that jury to find negligence on the basis which violates the defendant's rights under Article VI, Clause 2 of the United States Constitution pertaining to the question of whether or not federal law will prevail in this case and it's contrary to federal law for 45 U.S.C.A. 51 which is the Federal Employers' Liability Act. As mentioned before, by making these specific objections to Instruction 3, I don't intend to waive any objections that I might otherwise have to Instruction 3; and I don't intend to waive any objections otherwise available to any of the instructions.

And, continuing my objections, I'd like to object to the action of the Court in—

THE COURT: The defendant has submitted Instructions which are entitled A, B, C, D, E, F, and Interrogatories to the Jury.

MR. MORRIS: And, I'd like to, on behalf of the defendant, object to the Court's—

THE COURT: The Court is refusing these instructions. [588]

MR. MORRIS: I want to object to the action of the Court in refusing the instructions tendered by the defendant lettered A, B, C, D, E, F, and the special interrogatories to the jury, for the reasons that these instructions are legal instructions under the federal case law and under the Federal Employer's Liability Act even though they are not in Missouri instructions, not in the Missouri approved instructions. The reason I want to object, on the grounds, specifically, now, and the grounds specifically for my objections—I'm raising the constitutional grounds at the first opportunity—are that the Court's refusal of these instructions is a violation of the defendant's rights under the equal protection clause of the United States Constitution, 14th Amendment; Missouri Constitution, Article I, Section 2, for the reason that the defendant is being deprived of its property without due process of law under the United States Constitution, 5th Amendment and Missouri Constitution, Article I, Section 10; and for the further reason that these instructions are all applicable instructions under the Federal Employers' Liability Act, 45 U. S. C. 51, and should be given because of the fact that federal case law and the F.E.L.A. federal case law prevails over Missouri law. [589]

THE COURT: The Court will refuse Instructions A through F and the Interrogatories to the Jury.

* * *

APPENDIX F

IN THE CIRCUIT COURT CITY OF ST. LOUIS

James C. Bair

v.

St. Louis San Francisco Railroad, a Corporation,

No. 55645-F Room February 11, 1980

MEMORANDUM FOR CLERK

Defendant's Motion for a Directed Verdict at the close of all the evidence, or in the alternative for a new trial is overruled.

S/RICHARD J. BROWN,
Judge.

cc: Gerald D. Morris
Atty for Defendant
1023 Frisco Building
906 Olive Street
St. Louis, MO 63101

Marshall Friedman,
Atty. for Plaintiff,
Paul Brown Bldg., 4th Fl.
818 Olive Street
St. Louis, MO 63101

APPENDIX G

[Pertinent paragraphs from Petitioner's Motion for New Trial, L.F. pp. 15-26]

* * *

11. The Court erroneously refused to permit defendant to cross-examine plaintiff concerning knowledge that he did not have to pay income taxes on any amount he receives as judgment in this case, and that he did not receive personal benefit from what he paid in taxes on his wages, and that he was asking the jury to compensate him for his gross before tax income instead of his true after tax income. Said denial by the Court denied defendant equal protection of the law under the Fourteenth Amendment to the United States Constitution and Article I, Section 2, of the Missouri Constitution; and deprived defendant of its property without due process of law in violation of the United States Constitution, Fifth Amendment, and the Missouri Constitution, Article I, Section 10, and in violation of defendant's rights under the federal common law as it pertains to the Federal Employers' Liability Act, 45 U.S.C.A. Sections 51, et seq., and Article 6, Clause 2 of the United States Constitution, all to the prejudice of defendant.

* * *

19. The Court prejudicially erred in giving, at the request of plaintiff, plaintiff's verdict directing instruction No. 3, which is M.A.I. 24.01, because:

a) said instruction constitutes a roving commission particularly by use of the words "safe conditions for work" and "safe methods for work" in Paragraph First thereof, in that it permitted the jury to find against defendant for any circumstances they might decide was a condition or method of work whether or not said circumstances was shown by the evidence to be a legal grounds for recovery or even included

within the scope of plaintiff's pleadings or the issues as made by the evidence at trial;

b) said instruction did not confine the jury to deciding the issues presented by the pleadings and evidence, but instead permitted them to speculate and conjecture as to the grounds for defendant's liability;

c) the submissions of Paragraph First thereof are vague and meaningless and afford the jury no guide in the application of the law to the facts nor does it guide them in the issues to be decided;

d) there was no evidence to support the submissions of Paragraph First thereof;

e) said instruction failed to submit the real issues of the case, namely whether defendant failed to provide the plaintiff with temporary flooring or force plaintiff to work without giving him the opportunity to get temporary flooring;

f) the submissions of Paragraph First are not supported by sufficient evidence to permit the jury to make a finding thereunder;

g) M.A.I. 24.01 is a vague, roving commission affording the jury no guide in the application of law to fact or in setting forth the actual issues to be decided;

h) said instruction No. 3, in being mandatory under the M.A.I., (Instruction 24.01) is discriminatory against Federal Employers' Liability Act defendants in that it does not meet the standards set by law and rule in this State for verdict directing instructions against non-Federal Employers' Liability Act defendants, or even non-Federal Employers' Liability Act employee or employer defendants. The Supreme Court, in requiring and permitting the use of said instruction 24.01

against Federal Employers' Liability Act defendants only deny Federal Employers' Liability Act defendants, including this defendant in this trial, their rights to equal protection of the law under the Constitution of the United States, Fourteenth Amendment, Missouri Constitution, Article I, Section 2. Said defendants are also deprived of their rights under the United States Constitution, Fifth Amendment, and the Missouri Constitution, Article 1, Section 10. Further, the defendant's rights under the Federal Employers' Liability Act, and federal common law pertaining thereto, requires that defendant be found liable for specific negligent conduct and not for the general roving commission concept of negligence as set forth in instruction No. 3 and in M.A.I. 24.01, in violation of defendant's rights under Article 6, Clause 2 of the United States Constitution.

20. Instruction No. 7, plaintiff's damage instruction, was erroneously given by the Court to the prejudice of defendant in that the instruction uses the phrase "occurrence mentioned in the evidence," which is a vague, roving commission speculative phrase which did not confine the jury's consideration to the event involving plaintiff's moving the air jack, but instead permitted them to consider many occurrences mentioned in the evidence for which defendant is not liable; for example only, that plaintiff worked three years after the air jack incident lifting air brake cylinders weighing 40-60 lbs. regularly, or that defendant permitted plaintiff to work even though plaintiff was complaining of his back. Said language is a roving commission and does not require that the jury find that plaintiff's damages resulted from the air jack incident as is pleaded by him.

Further, said instruction erroneously omits the word direct, or some other limiting word or phrase such as "in whole or in part", in the phrase "as a result of the occurrence". The federal common law pertaining thereto and the Federal Employers'

Liability Act do not permit indirect or remote damages from defendant's negligence. They provide that the defendant shall be liable in *damages* for *injury* resulting in whole or in part from the negligence of the railroad. In short, instruction No. 7 and M.A.I. 8.02 are clear misstatements of the law permitting the jury to find defendant liable for indirect, remote, speculative and conjectural damages.

This instruction is limited by the M.A.I. Notes on Use, thus the Supreme Court Rule, to Federal Employers' Liability Act cases and, hence, is discriminatory against Federal Employers' Liability Act defendants. In compelling the use of said instruction, the Supreme Court of Missouri has deprived defendant of its rights under the equal protection of laws provision of the United States Constitution, Fourteenth Amendment, and Missouri Constitution, Article I, Section 2, and has deprived defendant of its property without due process of law in violation of defendant's rights under the United States Constitution, Fifth Amendment, and the Missouri Constitution, Article I, Section 10, and has denied defendant its rights under the Federal Employers' Liability Act, 45 U.S.C.A. Sections 51, et seq., in that defendant is liable in damages only for injury (or death) resulting in whole or in part from its negligence, in violation of defendant's rights under Article 6, Clause 2 of the United States Constitution.

21. The Court prejudicially erred in refusing the following instructions tendered by defendant because said instructions are legal, valid instructions stating defendant's rights under the Federal Employers' Liability Act and the federal common law pertaining thereto:

a. Instruction A, the present value instruction. Said instruction is particularly important because of plaintiff's proof as to future wage loss in this case.

• • •

c. Instruction C, the income tax instruction. In this case, that instruction is particularly important because of plaintiff's proof as to the amount of future wage loss, which would be subject to taxes, whereas his award is not subject to income taxes.

* * *

e. Instruction E. This instruction clearly states defendant's federal common law rights against speculative and conjectural damages being awarded to plaintiff.

* * *

22. The Court's refusal to give instructions lettered A, B. C, D. E and F, and the Interrogatories to the Jury, all tendered by defendant, deprives defendant of its rights under the equal protection of laws provision of the United States Constitution, Fourteenth Amendment, and the Missouri Constitution, Article I, Section 2. Further, defendant is thereby deprived of its property without due process of law in violation of its rights under the United States Constitution, Fifth Amendment, and the Missouri Constitution, Article I, Section 10. Further, defendant is thereby denied its rights under the Federal Employers' Liability Act, 45 U.S.C.A. Sections 51, et seq., and the federal common law pertaining thereto, and Article 6, Clause 2 of the United States Constitution.

APPENDIX H

* * *

[The following instructions were tendered to the trial court by Petitioner but refused by that court].

INSTRUCTION NO. A

If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must therefore determine the present value or present worth of the money which you award for such future loss. [L.F. 29]

INSTRUCTION C

If your verdict is in favor of plaintiff your award will not be subject to any income taxes and you should not consider such taxes in fixing the amount of your award. [L.F. 31]

INSTRUCTION E

You are not permitted to award the plaintiff speculative damage by which term is meant compensation for future detriment which, although possible, is remote, conjectural or speculative. You can only award for future detriment if a preponderance of the evidence shows such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury in question. [L.F. 33]

APPENDIX I

8.02 Damages - F.E.L.A. - Injury to Employee

* * *

Committee's Comment (1978 New)

This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplication of MAI 4.01 with two exceptions. The word "direct" is deleted from the fifth line of MAI 4.01. This is required in an F.E.L.A. case so that the instruction complies with the correct substantive law, *Wilmoth* v. *Rock Island Ry.*, 486 S.W.2d 631 (Mo. 1972); *Crane* v. *Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 314 (1969); and *Rogers* v. *Mo. Pac. Ry.*, 352 U.S. 500 (1957).

No. 82-2143

IN THE

Supreme Court of the United States

TERM 1983

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor In Interest by Merger to St. Louis-San Francisco Railway Company,
Petitioner,

v.

JAMES C. BAIR,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court may properly consider petitioner's contentions concerning its separate present value instruction-when the judgment below on that point rests upon an independent and adequate state ground and when, as here, Missouri practice is consistent with this Court's current views as to computation of damages.

2. Whether the Missouri Approved (MAI) FELA damages instruction may be properly given when the same was designed for the purpose of complying with the Federal Liabilty Employers Act (FELA), which is an avowed departure from the common law.

3. Whether the court below, having reviewed the evidence as to damages and having found the verdict herein to be reasonable and not to be excessive, properly affirmed that verdict by applying a harmless error analysis, a procedure sanctioned by this Court, to the trial court's failure to give a separate income tax instruction; and whether this Court should review the aforesaid issue since a *Liepelt* type instruction has now been made a part of the Missouri Approved (MAI) FELA damage instructions and the issue is therefore unlikely to recur in the Missouri Courts.

4. Whether the trial court could properly give a verdict directing instruction based on MAI 24.01, a form of instruction approved by the Missouri Supreme Court for FELA cases, when that instruction was fully consistent with and properly set out federal substantive law under FELA.

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No. 82-2143

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BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTIONAL STATEMENT

Respondent accepts petitioner's jurisdictional statement with the following exceptions: Respondent specifically denies that jurisdiction of the questions presented is properly invoked under 28 USC § 1257(3), on the ground that, as to certain of those questions as will be explained more fully below, the judgment of the Missouri Supreme Court, en banc, rests upon an independent and adequate state ground of decision. Respondent further specifically denies that the pattern jury instructions petitioner challenges are in any manner unconstitutional or that the judgment of the Missouri Supreme Court, en banc, is contrary to any applicable decision of this Court or the United States Courts of Appeal.

STATEMENT OF THIS CASE

Petitioner's statement of the case does not constitute a full and fair statement of the facts relevant to the issues herein. In order to avoid repetition additional relevant facts will be set forth under the appropriate point in the argument.

ARGUMENT

I.

This Writ Should Be Denied Because This Court Is Without Jurisdiction Of Petitioner's Contentions Regarding The Separate Present Value Instruction In That The Missouri Supreme Court Rejected Petitioner's Contentions On An Independent And Adequate State Ground. The Writ Should Further Be Denied Because The Missouri Supreme Court Decision In The Instant Case Is Entirely Consistent With And In Compliance With This Court's Current Views Pertaining To The Computation Of Damages Under Federal Law.

This Court is without jurisdiction of petitioner's (hereinafter "petitioner" or "defendant") contentions regarding the refusal of the trial court to give a separate "present value" instruction. The opinion of the Missouri Supreme Court, en banc, on this issue clearly indicates that the rejection of petitioner's claims was based upon an independent and adequate state ground which bars review in this Court. *Murdock* v. *City of Memphis,* 20 Wall. (87 U.S.) 590, 22 L.Ed. 429 (1875); *Henry* v. *State of Mississippi,* 379 U.S. 443 85 S.Ct. 564, 13 L.Ed.2d 408 (1965); *Michigan* v. *Tyler,* 436 U.S. 499, 512 n.7, 98 S.Ct. 1942, 1951 n.7, 56 L.Ed.2d 486 (1978).

The basis of the Missouri Supreme Court's rejection of petitioner's claim is set forth in its opinion in the instant case as follows:

> Frisco's third point is that the Trial Court erred in refusing to submit to the jury a present value instruction. In Dunn, at p. 253, we dealt with a very similar issue and held that a present value instruction was not appropriate under MAI. We are not persuaded that Federal law requires the instruction. Frisco's third point is denied.

647 S.W.2d at 510.

The *Dunn* case referred to in the opinion in the instant case disposed of a similar contention concerning the refusal of a separate present value instruction as follows:

> Instruction 7, a damages instruction authorized by MAI 4.01, was given in this case. Any further explanation of the MAI damages instruction by the tendered instruction E is not acceptable procedure under MAI. McBee v. Schlupbach, 529 S.W.2nd 435, 439 [2] (Mo.App. 1975); Jurgeson v. Romine, 442 S.W.2nd 176, 177 [1-3] (Mo.App. 1969).
>
> Thus, defendant's proffered instructions B, D, and E were properly refused under MAI. Further, the circumstances or the guidelines set forth in Rogers v. Thompson, 308 S.W.2d 688, 692 [2] (Mo. 1958), would not indicate that the trial Court's action interfered with Federal rights. There is no compelling reason to limit application of the general rule that the form of instructions and manner in which the substantive law is submitted to the jury in an F.E.L.A. case are procedural matters governed by state law. Rogers; 79 A.L.R.2d 553, 572-573 (1961).

Dunn v. *St. Louis-San Francisco Railway Co.*, 621 S.W.2d 245, 253 (Mo. banc 1981), *cert. denied sub. nom. Burlington Northern Railroad Co.* v. *Dunn*, 454 U.S. 1145, 102 S.Ct. 1007 (1982).

Examination of one of the cited cases, *Jurgeson* v. *Romine*, 442 S.W.2d 176 (Mo.App. 1969), more fully reveals the basis for the Missouri Supreme Court's opinion. In that case, a damage instruction authorized by MAI was given by the Court. The defendant in that case, rather than seeking to submit a proper modification of the MAI instruction, offered a separate damage instruction, Instruction No. 8 which was refused by the Court. In rejecting the defendant's contention on appeal that it was error to refuse the separate damage instruction, the Court held as follows:

Furthermore we presume defendant offered Instruction No. 8 pursuant to the rule generally observed before the adoption of M.A.I. that 'Where an instruction on the measure of damages, though general, is not erroneous in its general scope, its generality does not constitute error and if the defendant fears such instruction may be misunderstood he must submit an explanatory or modifying instruction or he will not be heard to complain.' Raymond, Missouri Instructions, Sec. 132; Brunk v. Hamilton-Brown Shoe Company, Mo., 66 S.W.2d 903, 909. Samuels v. Illinois Fire Insurance Co., Mo.App., 354 S.W.2d 352, 362(20). However, Supreme Court rule 70.01 (b), which has been effective since January 1, 1965, provides:

> Whenever Missouri Approved Instruction contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

We take it that this applies to measure of damages instructions. The Jack L. Baker Companies, Inc. v. Pasley Manufacturing and Distributing Company, Mo., 413 S.W.2d 268, 273 (5,6). The old rule authorizing separate damage instructions for plaintiffs and defendants should no longer be followed. If the offered Instruction No. 3 did not clearly submit the issues in this case, it should have been modified so that it would do so. The trial court did not err in refusing Instruction No. 8.

442 S.W.2d at 177

Again, in *McBee* v. *Schlupbach,* 529 S.W.2d 435 (Mo.App. 1975), the Court reversed and remanded for a new trial on the issue of damages when a separate instruction offered by the defendant was offered and given in addition to the applicable MAI damage instruction. In that case, the MAI instruction fair-

ly submitted all of the damage issues in the case and the separate instruction argumentatively emphasized elements contained in the defendant's converse verdict directing Instruction No. 5.

These conclusions follow directly from the literal language of Missouri Supreme Court Rule 70.02, dealing with jury instructions.

Rule 70.02(b) provides:

> (b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

Rule 70.02(e) provides:

> (e) Guide for the Form of Instructions Where MAI Not Used. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

Thus, under Missouri law, it is quite clear that if petitioner in the instant case deemed the damage instruction given by the Court to be inadequate because it contained no reference to present value, the proper procedure under Missouri law would have been for petitioner to have prepared a modified version of the MAI damage instruction embodying a brief, simple and impartial modification rather than the separate damage instruction which is offered and which was refused. The principle that separate damage instructions are not permitted under MAI is well established, uniformly applied, and well known to all members of the Missouri Trial Bar.

Missouri's procedural rules regarding Missouri Approved Instructions (and the form of instruction where a modification of a Missouri Approved Instruction is required) are supported by a legitimate, if not a compelling, state interest. That interest was set forth by the Missouri Supreme Court in *Brown* v. *St. Louis Public Service Co.*, 421 S.W.2d 255, 257 (Mo.banc 1967), as follows:

> This court, by its adoption of Missouri Approved Instructions, promulgated precise approved instructions. These had been drafted after much research and great effort on the part of the court's special committee and its able reporter, the late Professor John S. Divilbiss. A preliminary draft was distributed and suggestions were received from the bench and bar before final adoption. *The system was devised to eliminate the old system of complex, detailed and frequently argumentative instructions which caused great difficulty for jurors, lawyers and judges, and resulted in a high percentage of reversals on account of instructions given or refused. The special committee carefully considered the precise words to use in each approved instruction in order to provide simple, concise and understandable instructions.* Directions as to the format to be followed were given to cover those instances where no MAI instruction is provided or where the facts of a case require modification of an MAI instruction. When an MAI instruction is applicable, its use is mandatory. (emphasis supplied)

Contrary to petitioner's implications, the Missouri Supreme Court's disapproval of a separate present value instruction which, as set forth above, is inconsistent with the compelling policies of MAI, does not mean that Missouri rejects the present value principle in determining the proper measure of damages in F.E.L.A. cases or in cases involving any other sort of claim. The Missouri Supreme Court's per curiam opinion on rehearing in the instant case made it clear that the Court recognizes that the

proper measure of damages for lost future earnings is the present value of those future earnings. 647 S.W.2d at 513. The holding of the Missouri Supreme Court in the instant case is simply that the present value question should be handled by argument and the introduction of evidence rather than by instruction, since the MAI scheme is inconsistent with a multiplicity of damage instructions specifying each and every detail of damage computation. As recognized by the Missouri Supreme Court in the instant case, the present value question was so handled in *Sampson* v. *Missouri Pacific Railway Co.*, 560 S.W.2d 573, (Mo. banc 1978). See also *Coffman* v. *St. Louis-San Francisco Railway Co.*, 378 S.W.2d 583, 600 (Mo. 1964), relied on by the *Sampson* Court, 560 S.W.2d at 589. In this regard, it should be noted that defendant in the instant case, in final argument, vigorously argued the fact that plaintiff could earn interest on the award, and specified a rate of 6%, urging the jury to reduce its award, if any (T. 608-609, 640).

This approach, further, is not in any manner inconsistent with the prior decisions of this Court. Examination of *Cheaspeake & Ohio Railway Co.* v. *Kelly*, 241 U.S. 485, 36 S.Ct. 630 (1916), heavily relied on by petitioner, in light of this Court's recent opinion in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, ____ U.S. ____ 103 S.Ct. 2541 (1983), makes this clear. Petitioner cites *Kelly* for the proposition that an instruction on present value must be given to the jury in all cases. A close reading of *Kelly*, however, does not support that interpretation. In *Kelly*, the Court's opinion does not reflect any attempt on behalf of the railroad to present evidence as to present value. The railroad chose to present the issue only by requesting an instruction. The instruction was refused by the trial court and the Court of Appeals affirmed that refusal, holding that, as a matter of law, the proper measure of damages was the gross amount of the expected pecuniary benefits which would have been received from plaintiff's decedent and not the present value of that sum. In reversing, this Court did not hold that the only way

to approach the present value question was by instruction. Rather, this Court held that the Court of Appeals had erroneously interpreted the proper measure of damages by holding that the proper measure was a gross sum rather than the present value of that sum. Reversal was required because the Court of Appeals had explicity relied upon an improper measure of damages. This Court, however, made it very clear that the states would be accorded great flexibility in addressing this problem and stated as follows:

> Whether the difficulty should be met by admitting the testimony of expert witneses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum.

241 U.S. at 491, 36 S.Ct. at 632.

For many years following *Kelly*, a gross inequity was practiced wherein Courts employed a discount rate to reduce a plaintiff's award while refusing to take into account the effects of inflation or other factors which would result in such an award being inadequate. The demise of this inequity was foreshadowed by Justice Stevens' recognition that future inflation could be a proper subject of expert testimony and estimate in *Norfolk & Western Railway Co.* v. *Liepelt*, 444 U.S. 490, 494, 100 S.Ct. 755, 758 (1980). Thereafter, this Court explicitly addressed the problem, again through Justice Stevens, in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, ____ U.S. ____ 103 S.Ct. 2541 (1983).

In *Pfeifer*, this Court recognized that there was an inequity which could "no longer be tolerated", ____ U.S. at ____, 103 S.Ct. at 2552, in discounting an award of lost future earnings by a market interest rate while simultaneously ignoring the extent

to which such a rate either anticipates or is offset by future price inflation or other societal factors causing wage increases. Such a system undercompensates an injured plaintiff.

This Court then went on to examine the various methods devised by the courts to apply the rule that the measure of damages for future lost wages is the present value of those lost wages in an inflationary economy. This Court, however, expressly declined to adopt any one of the approaches proposed to it "as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy." ____ U.S. at ____, 103 S.Ct. at 2552. Rather, this Court sought only to set forth the general parameters of legally acceptable approaches. The approach established by the opinion below in the instant case, allowing the damage issues for future lost wages to be addressed by expert testimony and/or argument without jury instruction on either inflation or the use of a discount rate, is entirely consistent with the flexible approach taken by this Court in *Pfeifer*.

The Court of Appeals in *Pfeifer* had held the total offset method, wherein future inflation is flatly assumed to wholly offset the discount rate, to be mandatory in the federal courts. This Court vacated and remanded that judgment because it was not prepared to force the use of that method on all parties in all cases, without any regard being given to the economic patterns in particular industries.

However, this Court noted that the so called Carlson method, see 62 ABAJ 628(1976), which posits the thesis that the market rate of interest is wholly offset by price inflation and societal productivity gains, is simple and may be economically precise. In explaining the use of the Carlson method, ____ U.S. at ____ n.32, 103 S.Ct. at 2557 n.32, this Court set forth an approach to damages calculation which would clearly eliminate the need for any instruction or evidence pertaining to a discount rate or inflationary trends; a rather explicit demonstration that the

federal law of damages does not require the instruction to be given in all cases.

The approach taken by the Missouri Supreme Court below in the instant case does not go so far, as does the Carlson approach, as to assume a total offset. Rather, in line with the policies of MAI, it forbids separate damage instructions on inflation or on discounting while allowing the parties to present evidence and argument in this regard to the triers of fact. In this manner, Missouri observes the federal measure of damages as set forth in *Kelly* while also accomodating the policies of its procedural system for jury instruction, in line with the *Kelly* Court's admonition that the precise method of observing the present value principle was a procedural matter left to the law of the forum. 241 U.S. at 491, 36 S.Ct. at 632.

The unarticulated premise of defendant's argument on this point, and with respect to its other challenges to Missouri jury practice, is that a state court trying an F.E.L.A. case must duplicate each and every procedural aspect of federal jury practice, right down to the form of instructions. But that notion has always been rejected by this Court as antithetical to the fundamental principles of federalism inherent in the concept of concurrent state and federal jurisdiction of F.E.L.A. suits. *E.g., Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U.S. 211, 36 S.Ct. 595 (1916). *See also Brown* v. *Gerdes*, 321 U.S. 178, 189-190, 64 S.Ct. 487, 492-493 (1944) (concurring opinion).

The opinion below exhibits complete fidelity to the substantive measure of damages in F.E.L.A. cases announced in Kelly as well as accomodating the flexible approach to the question of measuring damages in an inflationary economy espoused in *Pfeifer*. The opinion below is entirely consistent with the decisions of this Court and for that reason the writ should be denied.

II.

Defendant's Contentions Regarding The Omission Of The Word "Direct" From MAI No. 8.02 Are Likewise Entirely Without Merit.

Defendant's contentions concerning the absence of the word "direct" from MAI No. 8.02 are similarly without merit. It is a full and complete answer to defendant's constitutional contentions that the absence of the word direct from MAI No. 8.02 is for the purpose of making that instruction comply with the substantive law. Since the instruction is in this form for the purpose of complying with the substantive federal law, there can be no violation of equal protection, due process or the Supremacy clause, as this would clearly constitute a reasonable basis for the differences between MAI No. 8.02 and MAI No. 4.01. This matter was carefully considered by the Missouri Supreme Court Committee on Instruction and this change was only recently made in the 1978 revisions. The Committee explains this change as follows:

> This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplicate of MAI 4.01 with the exception that the word "direct" is deleted from the fifth line of MAI 4.01. This is done in an F.E.L.A. case so that the instruction complies with the correct substantive law, Wilmoth v. Rock Island Railroad 486 S.W.2d 631 (Mo. 1973); Crane v. Cedar Rapids and Iowa City Ry. Co., 395 U.S. 314 (1969); and Rogers v. Mo. Pac. Ry., 352 U.S. 500 (1957)." (MAI No. 8.02, Committee's Comment.)

The reasoning underlying the omission of the word direct from this damages instruction is further amplified in the committee's comment to the revision to MAI No. 24.01, which states as follows (MAI No. 24.01, Committee's Comment):

In an F.E.L.A. case, common law negligence rules are controlling except that these rules have been abrogated by F.E.L.A. Because of the 'in whole or in part' language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the slightest cause of the employee's injury. *Rogers* v. *Mo. Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

In the traditional negligence case, it is mandatory for the plaintiff to include the word 'direct' or 'directly' in his instruction because of the proximate (direct) cause requirements.

This prevents the jury from awarding damages or finding for plaintiff because of some indirect or contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. 'was enacted because the Congres was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence.' *Rogers* v. *Mo. Pac. Ry.*, supra, 352 U.S. 500, 507. The test of a jury case under F.E.L.A. is simply 'whether the proofs justify within reason the conclusion that employer's negligence played any part, even the slightest, in producing injury or death for which damages are sought.' (emphasis added). *Rogers* v. *Mo. Pac. Ry.*, supra, 352 U.S. 500, 506. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater* v. *C & O Ry. Co.*, 497 F.2d 1243, 1246.

As the United States Supreme Court has stated in *Rogers* v. *Mo. Pac. Ry.*, supra, in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common

law. Our state Supreme Court has consistently hald that the federal interpretation of F.E.L.A. is binding on the Missouri state courts. *Headrick* v. *Kansas City Southern Ry.*, 305 S.W.2d 478 (Mo. 1957); *Adams* v. *Atchinson, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

It is obvious from the foregoing that the Missouri Courts recognize that federal law is controlling as to substantive aspects of the F.E.L.A. in cases tried in state court. The present form of MAI 8.01 is nothing more or less than action designed to conform MAI instruction to federal substantive law. In this regard, a review of the F.E.L.A. damage instructions contained in *Devitt & Blackmar, Federal Jury Practice and Instructions,* shows they do not uniformly require inclusion of the word "direct." Judge Blackmar, coauthor of the foregoing authority and author of the opinion below, certainly cannot be considered a neophyte with respect to these issues, and his opinion below discloses no concern that MAI 8.02 deprives the defendant herein of any substantive federal rights in any respect. Further, the opinion below, in a finding not challenged by defendant in this Court, clearly notes, that on the facts of this case, there was no confusion on the part of the jury as to the incident responsible for plaintiff's damages, nor was the defendant in any manner prejudiced by MAI 8.02. 647 S.W.2d at 510.

For the foregoing reasons, defendant's contentions are entirely without merit.

III.

Petitioner's Contentions Concerning The Income Tax Instruction In This Case Are Completely Erroneous And Meritless. The Affirmance By The Court Below Was A Simple Application Of the Harmless Error Rule. Further, This Case Presents A Singular Situation Which Will Not Recur In The Missouri Courts Since MAI Now Requires Liepelt Type Instructions To Be Given In All F.E.L.A. Cases And The Failure To So Instruct Is Construed To Be Presumptively Prejudicial By The Missouri Courts.

Petitioner erroneously seeks to lead this Court to believe that the opinion below in the instant case will "emasculate *Liepelt*" (Pet. 16-17), arguing that trial courts in the future will cynically and deliberately refuse to comply with *Liepelt* secure in the supposed confidence that the error will not be held to be prejudicial or reversible. Nothing could be further from the actual situation, especially in the Missouri Courts.

Petitioner's argument totally disregards the fact that this Court, in *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870 (1981), specifically authorized an examination of the record in a case where the income tax instruction was refused to determine whether defendant had been prejudiced by the refusal in that case. In *Gulf Offshore*, a case under the Outer Continental Shelf Lands Act (OCSLA) this Court remanded to the State Court for a determination of whether state law in that case required a *Liepelt* type instruction and, if not, whether *Liepelt* nevertheless established a federal rule of decision which required such an instruction in an OCSLA case regardless of state law. This Court then directed that:

> If the court decides that it was error to refuse the instruction it may then address respondent's argument that petitioner was not prejudiced by the error.

453 U.S. at 488, 101 S.Ct. at 2880.

This Court has also given its implicit approval to the application of harmless error analysis to *Liepelt* type cases by its denial of certiorari in *Flanigan* v. *Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1370 (1981); and *Vanskike* v. *ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1632 (1982). *Cf. Ingle* v. *Illinois Central Gulf R. Co.*, 608 S.W.2d 76 (Mo.App. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359 (1981) (no prejudice to defendant unless damages awarded are excessive). The Courts in the foregoing decisions have consistently examined the question of whether there were objective

indications or evidence that the jury was operating under a false impression of the tax law. One primary indicator to be considered is whether the verdict returned by the jury is an excessive one. The obvious excessiveness of the verdict returned by the jury in *Liepelt* was clearly a factor which influenced this Court to find that reversible error has been committed.

A brief examination of the evidence pertaining to plaintiff's injuries and damages makes it quite clear that the verdict returned by the jury in the instant case can in no manner be considered to be excessive.

In reviewing the evidence in a light most favorable to the jury's verdict, and in indulging in all reasonable presumptions in favor of the verdict, it is apparent that the jury was able to conclude the following. Plaintiff was injured on January 18, 1973 (T.58). He was 30 years of age (T.50) and had not experienced significant back problems prior to that time (T.23,28,38-40,52,171). He had no preexisting back condition or abnormality of any kind (T.198,199,205-207,212,213, 376,409,442,446,461,462,480). He had been employed by the railroad since 1960 and had been continually engaged in heavy physical labor (T.52,56). He experienced severe pain immediately following his injury and was unable to stand or walk (T.100-102). Although he has received continual medical treatment thereafter, his severe pain and disability has continued to progress (T.102-105). He was required to seek a lighter job at work, however, he was unable to perform those duties and was unable to handle the work (T.104,107,172,179-182,186-192). He sought medical treatment to relieve his pain and disability without success (T.106,108). He received injections in the back, medication, back brace and other such treatment all to no avail (T.200,201,206-211,240,241). An Orthopedist initially recommended that he leave the railroad, however, plaintiff could not, it was his livelihood and he couldn't walk away from it (T.108). His pain and difficulty, however, became so severe that he became physically unable to continue his employment with the

railroad and was ultimately hospitalized (T.109-111). He underwent a spinal manipulation under general anasthesia, pelvic traction, physical therapy, heat treatments and massages with no improvement (T.109-111). He continued getting worse and was therefore rehospitalized for additional physical therapy and a myelogram (T.110,111,258,259). At that time he experienced severe back pain and stood with a left sided list (T.58,59). He had lost half the motion in his back and his muscles were in severe spasm (T.260,262). During those hospitalizations it was determined that plaintiff had degenerative disc disease, which is synonymous with disc injury, and reversed spondylolisthesis of the lumbosacral spine (T.242,251,263). The myelogram was abnormal and revealed a posterior bulge at the L4 disc space (T.307,308). The medical testimony conclusively established that the myelogram shows a ruptured disc (T.363,364, 365,420-424,431,481,482). Also the evidence at the trial revealed that in addition to the ruptured disc at L4-L5, plaintiff has sustained injury and deterioration to the disc at L5-S1, narrowing of the disc space between L4-L5 and L5-S1 and extensive injuries involving the bony structures of the lumbosacral spine. The injuries and damage to the bony structures include the apophyseal joints known as juxta-articular sclerosis; The right sacroiliac joint; reverse spondylolisthesis at L4 and L5; hypertrophic spurring and sclerosis at the facet joints of L4 and L5; degenerative arthritis and injury to the motion complex at L4-L5 and L5-S1 (T.263,267,268,272,273,277,279,280,284,285, 286-288,292,295,355,356,357,361,362-365,372,373,377,383,384, 385,386,387,388,420,421,422, 424, 431, 481, 482, 483, 484, 487, 489). The disc at L4-L5 is ruptured centrally, right towards the center, pushed straight back on the nerve roots (T.300-303, 307,308,373-375,414,415,423,424,484-489). Because of the severity of plaintiff's injuries, a normal disc operation will not relieve his symptoms (T.373-375,414,415,453,463,486,487). Plaintiff will require more extensive surgery involving a laminectomy;, removal of bone and an arthrodesis fusion from L4 to S1 (T.300-304,366,367,373-375,414,415). Plaintiff's con-

dition is permanent and progressive and he is unable to lift, bend, stoop or engage in any physical activities (T.304,385,390, 451,452,487). Plaintiff is going to get worse (T.398,487). Plaintiff will never be able to return to his railroad employment (T.304,385,390,451,452). It has been stipulated that plaintiff cannot rturn to the railroad in view of his injuries (T.113,168, 468). At the time of trial plaintiff's condition had deteriorated and it was becoming increasingly worse (T.116-120). He experiences constant pain and is extremely limited (T115-120). He has tried to get other work but has been unable because of his physical restrictions (T.115). His earnings since 1975 have been meager (T.114,115). In 1979 he earned less than $2,000 (T.115).

When one considers plaintiff's economic loss in light of his pain and suffering, it is obvious that this award can in no manner be considered to be excessive.

Further, it is obvious that this is not an appropriate case for the exercise of this Court's certiorari jurisdiction. Rule 17 of this Court's rules makes it clear that certiorari shall be granted only when there are special and important reasons therefor. The issue petitioner seeks to present concerning the *Liepelt* instruction and the treatment of it in the court below is extremely unlikely to arise in any future case. Immediately after the decision in *Liepelt* the Missouri Supreme Court Committee on jury instructions modified the MAI F.E.L.A. damage instructions to include a *Liepelt* type instruction instructing the jury that "any award you make is not subject to income tax." That modification to the instruction was approved by the Missouri Supreme Court and is now a part of the mandatory MAI damage instructions to be given in Missouri. It should be noted that this change in MAI instructions goes beyond *Liepelt*. *Liepelt* required that this instruction be given only upon the request of the defendant. The changes to the MAI instructions, however, do not limit this *Liepelt* addition only to cases in which the defendant requests the instruction. It is part of the body of the main instruction and must be given in every case. Further, because the *Liepelt* in-

struction is now part of the MAI damage instructions, it is expremely unlikely that the Missouri Supreme Court will ever employ the same harmless error analysis to the failure to give a *Liepelt* instruction as it did in the instant case. In *Brown* v. *St. Louis Public Service Co.*, 421 S.W.2d 255 (Mo. banc 1967), the Missouri Supreme Court, en banc, held that a deviation from an applicable MAI instruction which does not require modification under the facts of the particular case will result in a presumption of prejudicial error unless it is made perfectly clear by the proponent of the instruction that no prejudice could have resulted from the deviation. This standard would require the plaintiff to demonstrate and assume the burden of showing that no prejudice could have resulted. In the instant case, because this case was tried prior to the decision in *Liepelt*, and, therefore prior to the modification of MAI to conform with *Liepelt*, this strict harmelss error analysis was not applicable. Plaintiff is aware of no other case which is still pending in the Missouri Court system which was tried prior to the modification of the MAI damage instructions to include a *Liepelt* type instruction. Therefore, the issues presented by the Missouri Supreme Court harmless error analysis in the instant case will not recur. Accordingly, it would be entirely inappropriate to grant certiorari in order to review this issue.

For all of the foregoing reasons, defendant's contentions are entirely without merit and the writ should be denied.

IV.

Defendant's Contentions Concerning Plaintiff's Verdict Director, Based On MAI 24.01, Are Entirely Without Merit. The Instruction Is Consistent With The Provisions Of The Federal Employers Liability Act And, Accordingly, The Form Of The Instruction Is A Question To Be Determined By State Law.

Defendant's contentions concerning MAI 24.01 have previously been raised and consistently rejected in *Dunn* v. *St.*

Louis-San Francisco Railway Co., 621 S.W.2d 245, 254-255 (Mo. banc 1981), *cert. denied sub. nom., Burlington Northern Railroad Co.* v. *Dunn*, 454 U.S. 1145, 102 S.Ct. 1007 (1982); *Griffith* v. *St. Louis-San Francisco Railway Co.*, 559 S.W.2d 278, 280 (Mo.App. 1977), *cert. denied*, 436 U.S. 926, 98 S.Ct. 2821 (1978); *White* v. *St. Louis-San Francisco Railway Co.*, 602 S.W.2d 748, 754 (Mo.App. 1980); *Marshell* v. *Burlington Northern, Inc.*, 637 S.W.2d 168, 169 (Mo.App. 1982).

Contrary to defendant's argument, MAI 24.01 fully complies with the provisions of the Federal Employer's Liability Act. In fact, to the extent that defendant challenges the differences between the form MAI 24.01 and other verdict directors employed in the MAI system for causes of action arising under Missouri law, those differences are accounted for by the unique features of the F.E.L.A. which depart from the common law. This was fully explained by the Missouri Supreme Court in *Ricketts* v. *Kansas City Stock Yards Co.*, 484 S.W.2d 216, 221-222 (Mo. banc 1972). The Missouri Supreme Court explained the general submission of negligence in MAI 24.01 as follows:

> The Act [F.E.L.A.] provides an employer under it shall be liable "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees." 45 U.S.C. § 51. As recently said in Boeing Co. v. Shipman, 5th Cir., 411 F.2d 365, 371: "Slight negligence, necessary to support an F.E.L.A. action, is defined as 'a failure to exercise great care,' and that burden of proof, obviously, is much less than the burden required to sustain recovery in ordinary negligence actions. Prosser, Law of Torts, § 34, p. 186 (3d ed. 1964)"; see also Prosser, Law of Torts, § 82, p. 560, noting as to the F.E.L.A. negligence: "This has been said to reduce the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the 'vanishing point.' " ***This would seem to be a reason for MAI to allow a general submission of negligence in F.E.L.A. cases.***

484 S.W.2d at 221 (emphasis supplied).

The fact that MAI 24.01 is designed specifically to comply with federal substantive law is a complete answer to the defendant's equal protection, due process and supremacy clause arguments. Defendant's contention that MAI 24.01 is contrary to the F.E.L.A. or any other federal law applicable in this case is completely erroneous. Such contentions have previously been raised and rejected by this Court. In *Union Pacific R. Co.* v. *Hadley*, 246 U.S. 330, 38 S.Ct. 318 (1918), this Court rejected the defendant railroad's challenge to a submission of general negligence to the jury in emphatic terms, speaking through Justice Holmes:

> On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. *But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question.* We are not left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snow storm raging which the jury might have found to have been of unprecedented violence, and it was open to them to find in view of circumstances unnecessary to detail that the dispatcher ought not to have sent out Extra 510 West as he did and that he was grossly wrong in not allowing 504 to come in and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor of 501 at Potter. It is superfluous to say more upon this point.

246 U.S. at 332-333, 38 S.Ct. at 319 (emphasis supplied).

The evidence fully supported plaintiff's verdict directing instruction based upon defendant's failure to provide reasonably safe conditions for work and reasonably safe methods of work. With respect to defendant's failure to provide reasonably safe conditions for work the evidence established that plaintiff's supervisor instructed him to straighten the end of the box car, to push it from the inside outward (T.7,35,42). He was required to use a load or floor jack weighing approximately 300 pounds (T.8,31,32,44). The manufacturer's literature described the weight of the jacks as from 370 to 394 pounds (T.175). A 6 foot to 10 foot wooden pole would be used with the jack to push the end outward (T.16,17,42,44,45). The box car in which he was required to work had no floor (T.8,36,44,45,81). There was nothing to stand on other than the 14" center sill, inasmuch as the stringers had been removed (T.83,84). Before plaintiff started working, the employees requested the supervisor to provide plywood for a temporary floor to work on (T.8,81). The supervisor responded that plywood could not be furnished, to do it the way it was (T.9,81,82). In that car they were instructed to lay the jack on its side on the center sill; that's the only position they could get it in to push the corrugation out (T.10,13-15,46,89,96). One man would have to straddle the center sill and stand on a 2 inch flange on either side of the center sill (T.19,84,85). He would have to balance on the center sill and stabilize, lift and pull the entire weight of the jack along (T.14,15,19,20,46,95-100). The jack had wheels, but the wheel base was too wide for the center sill (T.15,16,91), and plaintiff was required to strain, pull and tug the heavy jack in order to reposition it (T.19,45,46,95). The sides and base of the jack were round, causing it to roll from side to side, making plaintiff's task even more difficult (T.10,11,91,96,97). Numerous employees testified that the conditions were unsafe because of the absence of flooring (T.12,21,47). They couldn't get adequate footing to stand and maneuver the heavy jack (T.12). If they had plywood they wouldn't have had to work in a strained

position (T.12). Without plywood, with the jack positioned on the center sill, it would be a one man job - no place for another employee to stand (T.13-15, 46,96). If there was ply wood provided, they could have used two or three men (T.12,13,20,49,96). Without plywood one man would have had to balance on the center sill and perform the heavy and strenuous lifting and pulling alone (T.14,15,19,46,84,85,96-100). The reason that only one man could do the job was because there was no place for another man to stand and assist him (T.20,96). The work was being performed by plaintiff under those conditions at the time of his injury (T.20). The aforesaid, therefore, clearly established the failure of defendant to provide reasonably safe working conditions which resulted in plaintiff's injuries.

With respect to defendant's failure to provide reasonably safe methods of work, the evidence unequivocally established that the jack and pole method was unsafe (T.10,11,22,38,43,47,49,50,72,74,84). The load jack was intended to be used to lift loads upwards while standing on its base (T.10,43,84). It was not supposed to be used laying down (T.43). There was no base for it to be positioned on its side (T.10). The sides were round and the jack would roll from side to side (T.10,11). Numerous complaints had been made to the supervisors prior to plaintiff's injury about using the jack and pole method to push the ends of cars outward (T.11,21,174,175). They were told that was the way they would have to do it (T.12). Although plaintiff completed his apprenticeship and had read various articles, he had never been instructed and had never read of the method of pushing the end of a car outward with a jack and pole (T.78,79). With minor damage, plaintiff had been taught the method of utilizing a heating torch and beating the end outward with a hammer (T.77). He had also been instructed in the method of heating and pulling the end outward with a mechanical hoist (T.77). With extensive damage, plaintiff was always taught to remove and straighten the end in the blacksmith shop (T.78). Numerous

employees testified that based upon their experience, the safe method to do that job would have been to remove the end and either replace it with a new one or have it straightened under the press at the blacksmith shop (T.22,38,47,49,50). That safe method of performing the work had been used on numerous occasions (T.22,72,74). The end can be removed in 30 to 45 minutes and pressed outin 20 minutes (T.70). 45 minutes to an hour would be required to replace the end (T.71). The blacksmith shop was a short distance from the work area (T.67). Althought the plaintiff suggested to his foreman that the end should be taken off and replaced or repaired, the foreman stated that he wanted it pushed out (T.75,80). Had the alternative method been utilized, it is clear that plaintiff would not have sustained the injuries and damages involved in this occurrence.

In the instant case, there can be no question that the evidence, viewed as a whole, justified a finding of negligence on the part of the defendant. The *Hadley* holding was re-echoed by the Court in *Blair* v. *Baltimore & O.R. Co.* 323 U.S. 600, 604, 65 S.Ct. 545, 547 (1945), as follows:

> The negligence of the employer may be determined by viewing its conduct as a whole. Union Pacific Railroad Co. vs. Hadley, 246 U.S. 330, 332, 333, 38 S.Ct. 318, 319, 62 L. Ed. 751. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

See also *Chicago & Northwestern Railway Co.* v. *Rieger,* 326 F.2d 329 (8th Cir.), *cert. denied* 377 U.S. 917, 84 S.Ct. 1182 (1964).

Under the provisions of the Federal Employer's Liability Act, defendant was obligated to fulfill its nondelegable duty to provide plaintiff with reasonably safe conditions and reasonably safe methods for work, stripped of its common law defenses

and liable if its negligence played any part, however slight, in producing plaintiff's injuries. This is a statutory negligence action that makes it significantly different from the ordinary common law negligence action. 45 U.S.C. Section 51, *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 507 - 509, 77 S.Ct. 443, 448-450 (1957); *Shenker* v. *Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7, 83 S.Ct. 1667, 1671-1672 (1963). Under the F.E.L.A., juries are not limited in their consideration of the evidence, as they are under common law actions. *Chicago, Rock Island & Pacific R.R.* v. *Melcher*, 333 F.2d 996, 999-1000 (8th Cir. 1964). They are permitted to draw inferrences based upon circumstantial evidence even though such inferrences might involve some speculation and conjecture. *Webb* v. *Illinois Central Railroad Co.*, 352 U.S. 512, 77 S.Ct. 451 (1957); *Lavender* v. *Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744 (1946). Instruction 3 submitted the ultimate issue of liability under the applicable substantive law.

Missouri rules concerning the form of approved instructions are procedural in nature. *Meredith* v. *Missouri Pacific Railroad Co.*, 467 S.W.2d 79, 82 (Mo. 1971). When, as here, an instruction in an F.E.L.A. case correctly states the substantive law and is clearly supported by the evidence, the form of the instruction is a matter left to state procedural law. *Union Pacific Railroad Co.* v. *Hadley*, 246 U.S. 330, 38 S.Ct. 318 (1918); *Minneapolis & St. Louis Railroad Co.* v. *Bombolis*, 241 U.S. 211, 36 S.Ct. 595 (1916); *C.f.*, *Lyons* v. *State of Oklahoma*, 322 U.S. 596, 601, 64 S.Ct. 1208, 1212 (1944); *Brown* v. *Gerdes*, 321 U.S. 178, 189-190, 64 S.Ct. 487, 492-493 (1944) (concurring opinion).

For all the foregoing reasons, defendant's contentions regarding MAI 24.01 are entirely without merit.

CONCLUSION

For all of the foregoing reasons, plaintiff (respondent) respectfully submits that the judgement of the Missouri Supreme Court, en banc, below, is entirely correct and that the same does not warrant review by this court. For that reason, it is further respectfully submitted and urged that the petition for writ of certiorari in the instant case should be denied.

Respectfully submitted,

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No. 82-2143

IN THE

Supreme Court of the United States

TERM 1983

BURLINGTON NORTHERN, INC., SUCCESSOR BY MERGER TO ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioner,

VS.

JAMES C. BAIR,
Respondent.

On Petition For Writ of Certiorari
To The Missouri Supreme Court

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

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REPLY BRIEF OF PETITIONER

Petitioner offers three short responses to new matter raised by respondent in his Brief in Opposition.

I

In addressing the issue of whether a present value instruction must be given, respondent purports to brief the recent decision of *Jones and Laughlin Steel Corp.* v. *Pfeifer*, ____U.S.____, 76 L.Ed.2d 768, 103 S.Ct.____(decided June 15, 1983). In describing *Jones*, respondent makes it sound as though with this case this Court has reversed its long-held position that a present value instruction is mandatory, as announced in *Chesapeake and Ohio Railway Company* v. *Kelly*, 241 U.S. 485, 36 S.Ct. 630 (1916). [See pages eight and nine, respondent's brief in opposition].

The focus of petitioner's point of error regarding the present value instruction is to have this court declare that an FELA defendant in Missouri State Court can exercise its right to have a present value instruction given to the jury. See *Louisville and Nashville Railroad Company* v. *Holloway,* 246 U.S. 525, 528, 62 L.Ed. 867, 38 S.Ct. 397 (1918), (relying on *Kelly, supra,* for this very rule). *Jones* reaffirms *Kelly, supra* and makes clear that *Kelly* is *the* decision requiring an award to be reduced to present value. *Jones and Laughlin Steel Corp.* v. *Pfeifer,* ____U.S.____, 76 L.Ed.2d at 783, [9]. In fact, the reason *Jones* set aside the judgment therein below was because in "performing its damages calculation, the trial court applied the theory of *Kaczkowski* v. *Bolubasz,* 491 Pa. 561 (1980), which was a "total offset" theory of valuation, . . . even though petitioner had insisted that if compensation was to be awarded, it 'must be reduced to its present worth.' " *Jones and Laughlin Steel Corp.* v. *Pfeifer,* ____U.S.____, 76 L.Ed.2d at 792. (emphasis added). Thus, despite respondent's statements in its brief in opposition, this Court rejected a "total offset" rule as the proper valuation rule. *Id.*

It is clear then that *Jones, supra,* safeguards the rule that an award for lost earnings must be reduced to its present value. Respondent's diversionary trek through various formulae involving inflation and its possible effect on an award fails to obscure the principle that a defendant is absolutely entitled to a present value instruction. *Jones and Laughlin Steel Corp.* v. *Pfeifer, supra,* is one more link in the strong chain of authority supporting that proposition.

II

Respondent's brief in opposition (pages six to seven) implies that petitioner's tendered present value instruction was properly refused by the trial court under Missouri practice because it was offered as a separate instruction instead of being submitted as a modification of Missouri's Approved Instruction 8.02.

In fact, under Missouri Approved Instruction practice, *any deviation* of an approved instruction is presumed error. Therefore, under Missouri practice, whether the present value issue is presented as a modification of MAI 8.02 or as a separate instruction is of no practical consequences. Submission of the issue either way is presumed error. Further, the Missouri Supreme Court did not reject the tendered instruction because it was submitted on a separate sheet of paper. They rejected it because the issue of present value simply cannot be submitted to a jury under Missouri Approved Instructions. It is that basic issue petitioner desires to have reviewed by this Court.

Respondent contends that the present value issue was actually argued during the course of petitioner's final argument. That is incorrect. Copies of the cited pages of the transcript, pertinent portions of which are attached here for reference as Exhibit A (pages 608, 609 and 640). These clearly show that petitioner's argument was an attempt to put into perspective how much money $418,000.00, the amount sought by plaintiff, really is. There was no suggestion or mention of a reduction of future losses to present value. Argument as to reduction to present value was at that time contrary to Missouri law and prohibited. *Dunn* v. *St. Louis-San Francisco Railway Co.*, 621 S.W.2d 245, 254 [16, 17-20] (Mo. banc 1981).

III

In an attempt to justify the Missouri court's refusal of petitioner's tendered income tax instruction, worded precisely the same as the instruction approved by this Court in *Norfolk & Western Railway Company* v. *Liepelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980), respondent sets out his damage evidence in great detail. Apparently he is trying to demonstrate that the verdict was reasonable in view of claimed injuries. He omits the undisputed fact that he has had no surgery and intends to have none even though he is claiming a bulging low back disc. He also omits Dr. Harmon's testimony that he has a

progressive disease in his low back which began before the occurrence of January 18, 1973, and continued thereafter. Further, respondent omits from his recitation of his evidence Dr. Harmon's testimony that much of the back condition could not be attributed to the January 18, 1973 occurrence, but was in substantial part due to his back disease.

More importantly, respondent neglects to inform the Court that his contributory negligence was a dominant issue in the case, submitted by appropriate instruction to the jury. Probably the jury verdict reflects a mitigation for contributory negligence. This cannot be stated with complete certainty because Missouri requires general verdicts even in FELA cases. However, it is a fair response to respondent's recitation of his injuries as justification for the size of the verdict, to point out that the verdict size also probably reflects a reduction because of plaintiff's contributory negligence. Certainly, the size of the verdict ($315,500.00) cannot be said to demonstrate that petitioner was not prejudicially harmed by the instructional deficiencies for which petitioner now seeks review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be allowed to issue from this Court to the Supreme Court of the State of Missouri.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief of Petitioner were hand delivered to the office of C. Marshall Friedman, Attorney for Respondent, 1133 Pine Street, St. Louis, Missouri, by the undersigned this 8th day of September, 1983.

GERALD D. MORRIS

APPENDIX

EXHIBIT A

Defendant's closing argument, by Mr. Morris

[Tr. 608] Maybe $418,000—I don't know how much, I can't even think how much $418,000 is. Maybe it's not much to him. But it is to me. And it is to the men, the supervisors that you saw out there. That's a lot of money. That's more money that I can imagine, $418,000. You receive $400,000 at 6 percent and you have got over $25,000 a year income. That would be nice, wouldn't it? That would be nice. That would be nice. Jim Bair comes up here, he gets $400,000, he [Tr. 609] goes back and he sells real estate. And you know what a real estate license means? It doesn't mean much right now, the market is a little slow. But in a year when the government lets go of the money again, you won't be able to keep up with the housing demand. And so we have a man who comes up here and asks you to give him, just on interest, a $25,000 income a year. Then he's going to go down and sell real estate. He's got a license. I just want you to think about that a minute.

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[Tr. 640] We're supposed to give him enough money so he can sit down today and draw $25,000 interest—interest. I wish somebody would do that for me. You could almost have one of my discs if you'd do that for me, you know.

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